IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,075

SHELDON E. STUNKEL, et al.,

Petitioner,

- vs. -

GAZEBO LANDSCAPING DESIGN, INC.,

Respondent.

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

This is an action to enforce a mechanics lien pursuant to Chapter 713, Florida Statutes (1991). As stated by the Fourth District Court of Appeal in its decision on review herein:[1]

> 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).[2]

(A.1-2.) In describing the facts of the case, the district court stated:

> 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 Stunkel's private jet, where they met with a tree collector, Turner

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[1] References to the decision of the Fourth District Court of Appeal contained in the appendix will be by the letter "A" with appropriate page numbers. References to the record will be by the letter "R" and to the transcript by "T" with appropriate page numbers. Petitioners will refer to themselves as the "Stunkels" and to respondents as "Gazebo".

[2] 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).

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> 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.

(A.2.)[3] The action arose when Gazebo sought to enforce its lien. As the district court stated:

> 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.

(A.3.) In ruling on the motion for involuntary dismissal, the trial court stated:

> I know I have to do it in the light most favorable to the unmoving party. This testimony was not sworn to this claim of lien. I think that is something more than a minor lapse, and I think the work was commenced long before that, and I think that is being charitable; okay?

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[3] It is interesting to note that while the district court found that Gazebo began work on December 5, 1990, in its claim of lien, which was supposed to be verified as true and accurate in all respects, Gazebo claimed it did not begin work until December 7, 1990. (R. 44.)

(T.125.) Gazebo placed the order for the trees that were delivered to the premises and on November 28, 1990, Gazebo paid the supplier $5,000 for those trees, more than 45 days before it served its Notice to Owner.[4] (T.38; T.51.) Gazebo's witness also testified that Gazebo delivered other rejected trees to the residence on November 20, 1990.[5]

Regarding the service of the Notice to Owner and Gazebo's president's signature on the claim of lien, the notary's jurat form reflects a signature date of January 15, 1991. However, the Claim of Lien "verifies" that the Notice to Owner was hand-posted on January 18, 1991--three days into the future.

After reviewing the facts and the trial court's ruling, the Fourth district held that the order granting involuntary dismissal was error and reversed the final judgment in favor of the Stunkels. In support of this holding, the court stated:

> 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.

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[4] Gazebo received partial payment for the trees and paid its supplier for the trees. Gazebo provided landscaping materials and services having a total value of $33,135.96 but remained unpaid for the landscaping and services, which it provided in the amount of $28,135.96 only.

[5] These trees were not acceptable and never were installed. Nevertheless, they were delivered, and if accepted, would have been installed immediately. (T.104.) Gazebo's representative was asked, "Had those trees been acceptable, you would have put them in the ground on the spot, wouldn't you?" (T.104.) He responded, "It is assuming. I assume so."

(A.3.) Although the Stunkel's cited a case that the trial court relied upon, the district court distinguished this case:

> 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.

(A.3-4.) Thus, the district court was unable to identify any case authority holding that the tagging and selection of the trees that were ultimately incorporated into the property were the "commencement" of work that started the forty five day period for a lien notice to be served. Nevertheless, the court could also not identify any contrary authority:

> 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.

(A.4.) Rather than deciding the issue on legal grounds, however, the court determined that fact issues remained:

> 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. 2d DCA 1981). If any reasonable interpretation supported Gazebo's claim, the Stunkel's 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 Stunkel's motion for involuntary dismissal.

(A.4.) The court specifically stated that it was not establishing a rule of law regarding when the furnishing of services are deemed to "commence", but then "suggested" the application of a "totality of the circumstances" approach to the issue by the trial court with the hope that this approach might eliminate possible confusion and uncertainty regarding the issue:

> 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.

(A.5.) Based on this analysis, the district court reversed the judgment but certified the following question of great public importance to this court:

> 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?

(A.5.) The Stunkel's timely motion for clarification was denied. Thereafter, the Stunkels filed a timely petition for review in this court. This court entered an order that postponed a decision on jurisdiction and set a briefing schedule.

ISSUES PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT PROPERLY ENTERED AN INVOLUNTARY DISMISSAL AGAINST GAZEBO AT THE CONCLUSION OF PLAINTIFF'S CASE BASED UPON A DETERMINATION AS A MATTER OF LAW THAT GAZEBO COMMENCED FURNISHING SERVICES AND MATERIALS MORE THAN 45 DAYS PRIOR TO SERVICE OF ITS NOTICE TO OWNER AND THE DETERMINATION THAT THE CLAIM OF LIEN WAS NOT IN STRICT COMPLIANCE WITH THE STATUTE.

SUMMARY OF ARGUMENT

The trial court properly entered an order of involuntary dismissal in favor of the Stunkels in this case because Gazebo failed to establish that it served a Notice to Owner within 45 days after beginning to furnish materials or services to the Stunkels, and because the trial court properly found that Gazebo had failed to comply substantially with the requirements for filing its claim of lien under section 713.08, Florida Statutes. The trial court correctly concluded that the services performed by Gazebo in arranging for a tree collector to deliver trees to the Stunkel's residence in November, along with Gazebo's traveling with the Stunkels in November to Tampa to order the trees that ultimately were installed at the residence, as well as Gazebo's partial payment for those trees in November, constituted the beginning of furnishing materials or services as a matter of law under the Construction Lien Law. As a result, the district court's reversal of the judgment below was error and its certified question should be answered in the affirmative.

In the alternative, the trial court also properly concluded that Gazebo had not substantially complied with the claim of lien statute when it admittedly failed to swear to the claim of lien and purported to predict events that had not yet occurred.

ARGUMENT

THE TRIAL COURT PROPERLY ENTERED AN INVOLUNTARY DISMISSAL AGAINST GAZEBO AT THE CONCLUSION OF ITS CASE.

The trial court's involuntary dismissal of Gazebo's claim was proper, because the evidence at trial failed to establish that Gazebo had perfected its right to enforce its claim of lien. A court's entry of involuntary dismissal, where the court has considered all of the plaintiff's evidence yet reached a legal conclusion that the plaintiff could not prove its case, should not be disturbed unless clearly erroneous. Waters v. Winn-Dixie Stores, Inc., 146 So. 2d 577, 580 (Fla. 2d DCA 1962); see also Air Travel Assocs. Inc. v. Eastern Airlines, Inc., 273 So. 2d 3, 4 (Fla. 3d DCA 1973) ("It is not necessary for this court to determine whether appellant's theory of its case is proper because the final judgment must be sustained for a failure to prove the case alleged.").

The district court found that the trial court erred because the evidence was reasonably susceptible to an interpretation in support of Gazebo's assertion that it did not commence any services until it actually began to dig holes on the Stunkel's property prior to delivery of the trees chosen by the Stunkels for planting. It relied upon a Second District decision, Charlotte Asphalt, Inc. v. Cape Cove Corporation, 406 So. 2d 1234 (Fla. 2d DCA 1981), which found error in a trial court order of involuntary dismissal in a mechanics lien foreclosure action based upon a factual dispute regarding the corporate status of the lienor at the time of its performance. In the instant action, the evidence on the question

at issue -- whether the selection of identifiable trees for delivery and planting by the lienor is the commencement of services under the lienholder's law -- is not in dispute. The latest possible date of commencement was December 5, 1991. This is within the forty-five day statutory grace period. However, the issue certified to this court is whether Gazebo's earlier actions of travelling with Stunkel, inspecting, selecting and tagging trees, ordering those trees, and paying a deposit for them, which occurred without dispute more than 45 days from the delivery of the notice to owner was, as a matter of law, commencement of the work for purposes of the lien law grace period.

The district court, after distinguishing an applicable case, and finding no other authority on the issue either way, suggested but did not specifically adopt a totality of circumstances test and identified particular questions to be addressed by the finder of fact in these types of cases. Although the court declared that it was not making any particular legal rulings and was simply suggesting a test to possibly resolve any confusion and uncertainty in this and future cases, its decision is in essence the announcement of a rule of law that needs to be reviewed by this court in order to provide the requisite certainty that the District court properly believed was necessary both for those in the construction industry and those landowners effected by the filing and attempted enforcement of statutory mechanic's liens.

In evaluating the issue it is necessary to look at the applicable statutes and the purposes behind them as well as the

authority that the District court rejected. When viewed properly, the trial court's ruling is reasonable and proper both as to the untimeliness of the notice to the Stunkels and the legal invalidity of the lien claim itself and the district court's refusal to affirm these legal rulings is error.

A. Gazebo failed to serve its Notice to Owner timely.

1. The applicable statutes support the trial court's ruling.

Under §713.06, Florida Statutes:

> A ... subcontractor ... who complies with the provisions of this part and is subject to the limitations thereof, 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 and the direct contract.

§713.06 (1), Fla. Stat. (1991).[6]

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.

§713.01(24), Fla. Stat. (1991).

A "materialman" is defined as:

> any person who furnishes materials under contract to the owner, contractor, subcontractor or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement or, for specially fabricated materials, off the site of the improvement for the particular improvement,

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[6] A " '[c]ontract" means an agreement for improving real property, written or unwritten, express or implied .... §713.01 (4), Fla. Stat.(1991), and a " '[c]ontractor means any person other than a materialman or laborer who enters into a contract with the owner of real property for improving it ...." §713.01 (6), Fla. Stat. (1991).

and who performs no labor in the installation thereof.

§713.01 (16), Fla. Stat. (1991).[7]

A "laborer" is:

> any person ... who ... personally performs on the site of the improvement labor or services for improving real property and does not furnish materials or labor services of others.

§713.01 (12), Fla. Stat. (1991).[8] In addition:

> "[p]erform" or 'furnish' when used in connection with the words "labor" or "services" or "materials" means performance or furnishing by the lienor or by another for him.

§713.01 (20), Fla. Stat.(1991). All potential lienors, 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 lienor's 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.... The notice must be served before commencing, or not later than 45 days after commencing, to furnish his services or materials.

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[7] " 'Furnish Materials' means supply materials which are incorporated in the improvement ..." §713.01 (9), Fla. Stat. (1991)

[8] " 'Improve' means ... place [or] make ... any improvement over, upon, connected with, or beneath the surface of real property, or excavate any land, or furnish materials for any of these purposes, or perform any labor or services upon the improvements ...; or perform any labor or services or furnish any materials in grading, seeding, sodding, or planting for landscaping services, including the furnishing of trees, shrubs, bushes, or plants that are planted on the real property ...." §713.01 (10), Fla. Stat. (1991). In addition, " '[i]mprovement' means any ... excavation [or] landscaping ... placed, made, or done on land ...." §713.01 (11), Fla. Stat. (1991).

§ 713.06(2)(a), Fla. Stat. (1989).[9] For those procrastinating lienor who fail to serve such notice timely, such failure "shall be a complete defense to enforcement of a lien by any person." §713.06(2)(a), Fla. Stat. (1989). These "[m]echanic's lien statutes are to be strictly construed," Aetna Cas. and Sur. Co. v. Buck, 594 So. 2d 280, 281 (Fla. 1992); Home Elec. of Dade County, Inc. v. Gonas, 547 So. 2d 109 (Fla. 1989), and the failure to serve the notice to owner in compliance with the statute is a complete defense. §713.06(2)(a), Fla. Stat. (1991).

It is axiomatic that each of the foregoing statutory provisions must be read together to determine the legislative intent and that each of the provisions must be given their plain and ordinary meaning and not be treated as mere surplus. See generally, Aetna Cas. and Sur. Co. v. Huntington Nat. Bank, 609 So. 2d 1315 (Fla. 1992); Ellis v. State, 622 So. 2d 991 (Fla. 1993); Carawan v. State, 515 So. 2d 161 (Fla. 1987). Here, Gazebo is a subcontractor of Bill Free that has orally undertaken the part of Bill Free's contract with the Stunkels related to the landscaping for the property. Unlike a "materialman", it performs labor in the installation of materials it furnishes and unlike a "laborer", it furnishes raw materials or labor services of others. Gazebo's oral agreement both expressly and impliedly includes the obligation to

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[9] In the Florida Construction Lien Manual, the author points out that the requisite notice to owner may be served prior to commencement of furnishing services or materials, and that "the 45-day period may be viewed as a 'grace' period in which a procrastinating lienor may still obtain a lien." 1 Stephen B. Rakusin, Florida Construction Lien Manual, Chapter 8 at 98 (1993).

select and identify trees that comply with the contract and to deliver and plant those trees on the Stunkel's land. This performance or furnishing of both services and material was accomplished by Gazebo and others on its behalf.

Although "commencing" is nowhere defined in the statute, in its plainest sense it means to start or begin.[10] Thus, Gazebo commenced (began or started) to furnish those services and materials in November 1990, more than 45 days before it served its Notice to Owner, via posting, on January 18, 1991. If the legislature intended only that the beginning of actual work at the "site of the improvement" began the 45 day grace period, then it could have started that period upon "commencing" the actual "improvement"-- the physical excavation or landscaping made or done on the land -- rather than upon "commencing to furnish his service or materials." Where the legislature chooses certain words and phrases and does not choose others then it must be assumed that that choice is intentional and has a specific purpose. P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988). Here, that purpose was to require potential lienors to notify the owner of their lien promptly, in fact even before they commenced to furnish services or materials if they so desired, and to deny the benefit of the statutory lien to those, such as Gazebo, that sat on their rights and failed to strictly follow the statutes provisions.

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[10] Courts must give undefined statutory language its plain and ordinary meaning. Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1993); Metropolitan Dade County v. Green, 596 So. 2d 458 (Fla. 1992).

Based on the foregoing, the trial court properly concluded that the services performed by Gazebo in arranging for a tree collector to deliver trees to the Stunkel's residence on November 20, along with Gazebo's traveling with the Stunkels to Tampa in November to order the trees that ultimately were installed at the residence, as well as Gazebo's partial payment for those trees in November, constituted the beginning of furnishing materials or services as a matter of law under Section 713, Florida Statutes. Accordingly, the District court's reversal of that ruling was error and this court should answer the certified question in the affirmative and reverse and remand with instructions to the district court to affirm the judgment below.

2. The record reflects that Gazebo commenced furnishing services prior to December 5, 1990.

William Greenberg, Gazebo's president, admitted that the services Gazebo provided included taking a customer into the field to select trees:

> Q. And that [taking the customer along to select trees] is part of the service that [Gazebo] Landscape Design would provide, correct?
>
> A. If the customer wants to see the product, we are putting into the ground, we are glad to take him to show it to him.

(T.63.) On direct examination, Mr. Greenberg also stated that Gazebo commenced work prior to December 5, 1990 when it placed the order for the trees:

> Q. What preparation was done, if any, outside of the premises other than what you are claiming had been done?

A. Placing the order for the trees.

Q. When was that order placed?

A. It was placed about--actually, it was placed when we went with Mr. Stunkel and he approved the trees.

(T.38.)

The trial court shortly thereafter indicated that the evidence seemed to establish that the Notice to Owner was untimely:

THE COURT: I am just curious. I have got your cross-examination yet.

Do you have any case law about when work commenced?

The testimony I have so far is that he placed the order for the trees while he was on the trip.

He had arranged for the collector and they drove all over Sarasota looking for trees. . . .

(T.45-46.)

Mr. Greenberg admitted that on November 28, 1990, he paid a portion of the purchase price for the trees that were delivered and ultimately installed at the Stunkel's residence.[11]

Douglas Greenhut, an employee of Gazebo, testified on direct examination that he first performed "work" on the Stunkel's project when he flew to Tampa in November of 1990:

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[11] Mr. Greenberg attempted to characterize this partial payment as a "deposit." However, his own testimony belies this legal conclusion. When asked whether this "deposit" was refundable, he stated that it was refundable only "if he [the supplier] doesn't deliver the trees." In this case, the trees were delivered. The trial court properly concluded this $5,000 payment constituted a down payment, rather than a deposit as found by the district court.

> Q. When did you first perform any work on this project?
>
> A. Well, we went out to Tampa in the plane. We flew out there and looked at the trees.
>
> We individually tagged each one, and looked at each one, and said they were okay and ordered them to be delivered.
>
> These trees are bought out of people's homes, yards. So they dig them up and properly treat them, tie the heads, and load them on trucks and bring them over.
>
> I would say that took two or three weeks.

(T.97.) He also testified that, prior to the Tampa trip, he had ordered a different tree collector dig trees out of people's yards to bring to the Stunkel's house. (T.101, 103.) Mr. Greenhut said:

> The guy's name was Eddie Thompson, a guy we hired. He has a crane truck. He goes to Miami and buys trees out of people's yards. He buys them and brings them to our nursery.
>
> I told him, in this case, to buy them and bring them to the job and show them to Jerry [the project superintendent for the general contractor] to see if they are acceptable.

(T.103.) Mr. Greenhut in essence admitted that, if the trees had been acceptable, he would have put them into the ground "on the spot." (T.104.) Later, Mr. Greenhut testified, "If the guy [Stunkel] likes the trees, we sold the deal." (T.114.) Mr. Stunkel did like these trees; he liked them when he chose them; by Mr. Greenhut's own testimony, then, the deal was sold at that time.

The trial court properly concluded from the uncontroverted evidence that Gazebo had commenced performing services some time before December 5, 1990. Simply because Gazebo's theory of its case differs from the court's legal determination based on the

facts presented does not justify reversal. Further, the district court's finding that the evidence reasonably supported that erroneous view of the law also does not justify reversal.

3. The record reflects that Gazebo commenced furnishing materials prior to December 5, 1990.

The trial court properly found that, as a matter of law, Gazebo had commenced furnishing materials prior to December 5, 1990, and that as a result, Gazebo's Notice to Owner was untimely. Gazebo urged that the furnishing of materials commences only upon delivery of the materials to the jobsite and cannot commence upon an over-the-counter purchase of materials that are later incorporated into the project. However, in Arlington Lumber & Trim Co., Inc. v. Vaughn, 548 So. 2d 727 (Fla. 1st DCA 1989), upon which the trial court relied in part, the court of appeal rejected the lienor's contention that the time period for serving the Notice to Owner could not run from an over-the-counter sale. It reasoned that as to section 713.01 (the definitional section of the lien statute):

> contrary to appellant's contention, however, that provision does not establish that delivery of materials to the jobsite is the only act that may be classified as furnishing materials under Section 713.01(6).

Id. at 728-29. Section 713.01(6) states that "Furnish materials" means supply materials which are incorporated in the improvement." It goes on to state, "The delivery of materials to the site of the improvement shall be prima facie evidence of incorporation of such materials in the improvement." Thus, the section, by its own terms, does not limit commencing to furnish materials to the

delivery of materials to the jobsite. Instead, the delivery of materials merely establishes a prima facie evidence that such materials that already have been supplied are "incorporated in the improvement" for purposes of the statute. The First District interpreted the language of the statute to mean what it said -- an over-the-counter purchase of materials that later was incorporated in the improvement constituted the furnishing of materials. The district court distinguished Arlington on the basis that the lienor in that case was a materialman. However, the First District's reasoning does not distinguish the rights of a materialman from that of a subcontractor. Rather, it simply supports the proposition derived from proper interpretation of the statutes that the commencement date for the 45 day period can arise earlier that delivery of materials to the site or the starting of excavation on the land. Gazebo purchased the trees as part of its contract to furnish trees to the residence. Once it purchased the trees, the time limit for serving a notice to the owner had begun to run.

The Florida Construction Lien Manual does not distinguish Arlington on the basis of a materialman lienor; instead, it states the following:

> In Arlington Lumber & Trim Co. v. Vaughn, it was held that the time for service of a notice to owner runs from the date of an over-the-counter sale of materials even if this precedes the actual delivery of materials directly to the job. The First District Court of Appeal reasoned that § 713.01(6) and § 713.06(2)(a):
>
> > establish that the furnishing of any materials which are incorporated in the improvement commences the

> running of the 45-day time period. Therefore, the initial over-the-counter purchase of materials for the Vaughn job on November 3 commenced appellant's furnishing of materials.
>
> In Arlington Lumber, supra, it was not clear as to whether the over-the-counter purchase was encompassed within the claim of lien. Obviously, it is arguable that an over-the-counter sale would not commence the time period if:
>
> (a) the lienor did not know the job to which the material was going, and
>
> (b) the over-the-counter sale was not included in the claim of lien.

1 Stephen B. Rakusin, Florida Construction Lien Manual, Chapter 8 at 99 (citations and footnotes omitted).

In this case, it was uncontroverted a payment was made for the trees prior in November 1990. That payment would not be refundable if the trees were delivered. The trees that actually were incorporated in the project were "tagged" or finally ordered for delivery prior to December 5. As a result, the trial court did not err in finding that, as a matter of law, the $5,000 downpayment for the trees constituted the furnishing of materials under the Construction Lien Law so as to trigger the 45-day grace period for procrastinating lienors to serve a Notice to Owner. Accordingly, the trial court did not err in dismissing the case and the district court's reversal of the trial court's legal conclusion was error.

B. Gazebo did not substantially comply with Section 713.08 in filing its claim of lien.

The trial court indicated two reasons for its entry of involuntary dismissal at the close of Gazebo's case. As noted above, the court found that Gazebo had commenced furnishing materials or services more than 45 days before it served the Notice to Owner. The district court only addressed the first basis and its certified question is limited to the timeliness issue. However, the trial court also found that the claim of lien was fatally flawed. As a result, the court concluded that Gazebo could not maintain its action to enforce the lien. In the event this court, within its discretion, goes beyond the question certified, then this issue serves as an additional basis for affirming the trial court.

Gazebo recorded a claim of lien against the Stunkel residence on February 14, 1991. That claim of lien purportedly was signed before a notary on January 14, 1991. Importantly, the claim of lien, which on its face states that it was "sworn to" and subscribed on January 14, 1991, also states that "On 1-18-91 the Lienor served his Notice to Owner on the owner by hand posted," four days <u>after</u> the date signed. Additionally, on cross-examination of Mr. Greenberg, who signed the claim of lien, it was learned that Mr. Greenberg never swore the truth of the matters asserted before the notary and was aware he was predicting matters into the future:

> Q. Sir, would you agree, in a particular business context, that it is difficult to

predict what is going to happen, if you need to rely on a third party to predict something?

A. Yes, I agree.

Q. Sir, you have a lien that is sworn out on 1/14/90 [sic].

Were you put under oath before you swore to the lien claim?

A. Come again.

Q. Were you put under oath and sworn before you signed this claim of lien, which is your Exhibit 6?

A. Sworn by whom?

Q. The notary?

A. We have an in-house notary.

Q. Did she swear you in before you signed this?

A. No.

Q. Did you get sworn in at any time with respect to this claim of lien?

A. No.

Q. And this says, sir, that it was sworn to on 1/14/91; and, yet, right above it, it says that you served your Notice to Owner by hand-posting it on 1/18/91.

Mr. Greenberg, this claim of lien reflects that this so-called Notice to Owner was hand-posted on 1/18/91.

* * * *

Q. Is that right that on 1/14/91, you are predicting what is going to happen four days later with this Mr. Herz, that walked in here and testified; is that correct sir?

A. I was signing a claim of lien that had to go to this man to post it.

Q. You had no idea he was going to do that on 1/19?

A. I knew he had to post it before the forty-five days were up.

(T.78-79.)

The trial court, in granting the motion to dismiss, stated, "This testimony was not sworn to this claim of lien. I think that is something more than a minor lapse . . . ." (T.125.) Thus, the trial court found that the failure to swear to the claim of lien and the prediction regarding service of the Notice to Owner was more than a technical defect; the court found that Gazebo had not substantially complied with the requirements of section 713.08. Accordingly, the court properly refused to enforce the lien.

This Court previously has held that Mechanic's lien statutes are to be strictly construed. Aetna Cas. and Sur., 594 So. 2d at 281. No court has enforced a lien where the lienor has admittedly failed to swear to the truth contained in the claim of lien and where the lienor admittedly made false assertions in the claim, as in the instant case.[12]

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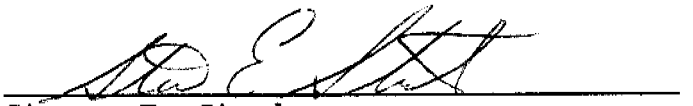
[12] The claims of lien of which courts have permitted enforcement contained only errors and omissions in the name of the lienor, or in the name of the party ordering the performance with whom the lienor was in privity, or in the description of the property, or in the amount of the claim, or in the description of the labor, services, and materials furnished, or in the date of the last furnishing upon the improvement, or in the name of the owner. See 1 Steven B. Rakusin, Florida Construction Lien Manual, Chapter 9 at 27-28 (citations omitted). No case has permitted enforcement of a lien that is unsworn, that on its face is fraudulent, and that wrongfully clouds the title to the property owner's castle--their residence.

In the instant case, the trial court determined that there had not been substantial compliance with the statute, and that the totality of the circumstances rendered the lien unenforceable. The district court reversed. However, this Court should reverse the district court's order, because Gazebo did not in good faith, reasonably, or substantially comply with the statute.

CONCLUSION

For the foregoing reasons, the Stunkels respectfully request that this Court accept jurisdiction, answer the certified question in the affirmative, reverse the district court decision, and affirm the trial court in all respects.

Respectfully submitted,



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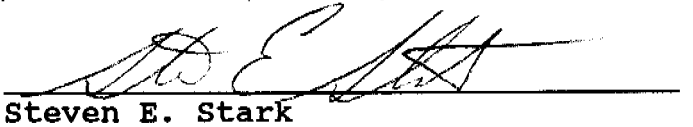
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 22nd day of August, 1994 to Robert E. Ferencik, Jr., Esq., Leiby Ferencik Libanoff and Brandt, P.A., Attorneys for Appellant, 290 NW 165th Street, Penthouse 2, Miami, Florida 33169.



Steven E. Stark

SES.35185.01.4/90

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.

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> 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.