COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

SIMS-LOHMAN, INC.	:	
Plaintiff	:	**CASE NO. 2014 CVC 01354**
vs.	:	**Judge McBride**
TIMOTHY PAPPAS, et al.,	:	**DECISION/ENTRY**
Defendants	:	

Eberly McMahon LLC, Robert A. McMahon, counsel for the plaintiff Sims-Lohman, Inc., 2321 Kemper Lane, Suite 100, Cincinnati, Ohio 45206.

Gary A. Rosenhoffer, counsel for the defendants Timothy Pappas and Tracy Pappas, 313 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion for summary judgment filed by the defendants Timothy Pappas and Tracy Pappas and a cross-motion for summary judgment filed by the plaintiff Sims-Lohman, Inc. (hereinafter "Sims-Lohman").

The court scheduled and held a hearing on the motions for summary judgment on March 20, 2015. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On November 27, 2012, Gold Point Custom Construction, LLC filed its complaint in Clermont County Common Pleas Case No. 2012 CVE 002272.[1] That complaint alleged that Timothy Pappas and Tracy Pappas owed Gold Point Custom Construction money for labor and materials expended in the construction of a new residence and sought foreclosure on a mechanic's lien.[2]

"Moerllering Industries, Inc. dba Sims Lohman Fine Kitchens" was named as a defendant in the case because it "could claim to have an interest in the real property * * * by virtue of an Affidavit for Mechanics Lien filed with the Recorder of Clermont County * * * ."[3] The complaint filed by Gold Point Custom Construction stated that Sims-Lohman "should be required to set forth their claim or be barred."[4]

Judge Victor Haddad found as follows in a written decision addressing a motion made by Timothy and Tracy Pappas to "dispose of all claims":

> "A Court Trial was conducted in this case on January 8, 2014. The only parties participating at trial were the plaintiff and the defendants Timothy Pappas and Tracy Pappas. The Court issued a decision ("the Decision") on March 14, 2014 resolving the issues presented at trial.

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[1] Defendants Pappas Motion for Summary Judgment, Attachment, certified copy of Complaint in Foreclosure.
[2] Id.
[3] Id. at ¶ 10.
[4] Id.

Prior to the trial, Sims Lohman filed for a mechanic's lien against the Pappas's property due to an account that was allegedly unpaid. Thereafter, Timothy Pappas and Tracy Pappas filed a notice of intent to commence lawsuit; thus, the mechanic's lien that Sims Lohman filed was released. Since Sims Lohman no longer had an interest in the property, it did not file an answer or otherwise participate in the case.

In the Court's decision, it went through a lengthy analysis regarding each issue that was presented at trial. One such issue involved the debt alleged between the defendants Timothy Pappas and Tracy Pappas and the defendant Sims Lohman. The Court included the following language in its decision:

'[T]he court finds that the defendants should be personally responsible for paying Sims Lohman themselves since it has placed a mechanic's lien on their home. * * * Since the defendants have a direct interest in making sure Sims Lohman is paid in a timely manner, the Court finds that they are personally responsible for paying this company in the amount of $29,538.99, or by other agreement. This amount shall be offset against the amount the Court previously determined that the defendants owe to the plaintiff.'

* * *

The Court admits that its discussion in the Decision might not have been articulated in the best manner. The discussion regarding the amount was clearly for the limited purpose of offsetting what the defendants Pappas owed the plaintiff. Additionally, as counsel for Sims Lohman noted, it did not file any counterclaims or cross-claims in the case, thus there was no cause of action by Sims Lohman upon which the Court could grant judgment. For these reasons, the Court finds the Decision to be sufficiently clear that no judgment was granted in favor of Sims Lohman * * *.

Counsel for Sims Lohman stated, on the record, and the Court agrees, that the defendants * * * Sims Lohman (Moerllering Industries) * * * were made parties for the sole purpose of asserting any interest they may have in the property should the Court grant the foreclosure. None of those parties asserted any counterclaims against the plaintiff, nor did they assert any cross-claims against the

> defendants Pappas. Thus, when the Court denied the foreclosure, these parties no longer had any interest in the action since their sole reason for being a part of the case was the foreclosure. * * * "[5]

On October 10, 2014, Sims-Lohman filed the present action against Timothy Pappas and Tracy Pappas, asserting claims for unjust enrichment and promissory estoppel, alleging that the plaintiff provided a benefit to the defendants when it delivered construction goods and/or materials to their property and the defendants have retained the benefit.[6] Sims-Lohman further alleged that the defendants made a clear and unambiguous promise to the plaintiff to compensate it for the goods and/or materials it provided to the defendants.[7]

The defendants moved for summary judgment, arguing that the doctrine of *res judicata* bars the plaintiff from filing the present action. The defendants argue that the claims raised in the case at bar could have been litigated in the 2012 case and, as such, claim preclusion operates to bar the plaintiff's action.

The plaintiff filed a cross-motion for summary judgment arguing that it is entitled to judgment in the amount of $27,298.93 on its claims in the present case.

The plaintiff also filed several affidavits in this case. Shawn Bell, the owner of Gold Point Custom Construction, avers in his affidavit that his company used Sims-Lohman as a vendor to buys "cabinets, granite countertops, Formica laminate countertops, cultured marble countertops, decorative floors[,] and hardware for use at the defendants' property."[8] Bell notes that Timothy Pappas and Tracy Pappas

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[5] Id., Attachment, Decision/Entry filed September 23, 2014.
[6] Complaint at ¶¶ 14-15.
[7] Id. at ¶ 21.
[8] Affidavit of Shawn Bell at ¶ 3.

specifically selected or approved the various products purchased from Sims-Lohman.[9] Bell attached copies of the invoices for these products to his affidavit and notes that he has no knowledge of the defendants ever disputing the quality of these products, materials, and services.[10] Bell acknowledges that Gold Point Custom Construction made several partial payments to Sims-Lohman and, applying said payments, the unpaid balance since the summer of 2012 has been $27,298.93.[11] Bell states that the defendants never paid Gold Point Custom Construction for the products, materials, and services provided by Sims-Lohman.[12]

Roger Ollila, the Controller for Sims-Lohman, states in his affidavit that the plaintiff did business with Timothy Pappas and Tracy Pappas in connection with their property located at 965 Merwin Ten Mile Road, New Richmond, Clermont County, Ohio, as a vendor for their contractor Gold Point Custom Construction.[13] Ollila attached to his affidavit copies of the invoices for the materials and services provided to the defendants.[14] He notes that the invoices are for "Homecrest kitchen cabinetry, Homecrest master bathroom cabinetry, Aristokraft bathroom cabinetry, Aristokraft utility room cabinets, granite countertops for the kitchen and master bathroom, Formica laminate countertops for the utility room, cultured marble countertops for the bathroom, decorative doors for the kitchen island, and hardware for the kitchen and bathrooms."[15]

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[9] Id.
[10] Id. at ¶¶ 4-5.
[11] Id. at ¶ 6.
[12] Id. at ¶ 9.
[13] Affidavit of Roger Ollila at ¶ 4.
[14] Id. at ¶ 5.
[15] Id.

Ollila avers that the defendants received and retained these products and materials and never disputed their quality.[16] In fact, he states that he spoke with Tracy Pappas on two occasions during which she told him that she had no complaints about the materials provided by Sims-Lohman but refused to pay due to the ongoing dispute with Gold Point Custom Construction.[17]

Ollila states that, as of July 31, 2012, the principal amount due and owing was $30,298.93.[18] He notes that Gold Point Custom Construction paid Sims-Lohman the sum of $3,000.00 between November 2012 and March 2013 and, as such, the balance owed is currently $27,298.93.[19] Ollila avers that Sims-Lohman filed a mechanic's lien against the defendants at one time but ultimately decided not to foreclose on that lien and to allow it to expire.[20]

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[21]

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[16] Id. at ¶¶ 7-8.
[17] Id. at ¶ 12.
[18] Id. at ¶ 10.
[19] Id. at ¶ 11.
[20] Id. at ¶ 13.
[21] Civ. R. 56(C); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); and *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993).

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[22] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[23]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[24]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[25] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[26]

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[22] *Engel v. Corrigan*, 12 Ohio App.3d 34, 35, 465 N.E.2d 932 (8th Dist.1983); *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378 (6th Dist.1983); *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

[23] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

[24] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

[25] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

[26] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[27] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[28]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[29] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[30] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[31]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[32] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[33] The duty of a party resisting a motion for summary judgment is

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[27] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[28] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[29] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); and, *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997).
[30] Id.
[31] Id.
[32] Id.
[33] Id.

more than that of resisting the allegations in the motion.[34] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[35]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[36] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[37]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[38]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[39]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if

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[34] *Baughn v. Reynoldsburg*, 78 Ohio App.3d 561, 563, 605 N.E.2d 478 (10th Dist.1992).
[35] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *Welco Indus., Inc.*, supra, 67 Ohio St.3d at 346; and, *Gockel v. Eble*, 98 Ohio App.3d 281, 292, 648 N.E.2d 539 (8th Dist.1994).
[36] *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 659, 612 N.E.2d 1295 (9th Dist.1992).
[37] Civ.R.56(E); *Carlton v. Davisson*, 104 Ohio App.3d 636, 646, 662 N.E.2d 1112 (6th Dist.1995); and, *Smith v. A-Best Products Co.*, 4th Dist. Scioto No 94 CA 2309, 1996 WL 80533 (Feb. 20, 1996).
[38] *Carlton*, supra, 104 Ohio App.3d at 646; *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756, 603 N.E.2d 1049 (2nd Dist.1991).
[39] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[40] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[41] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[42]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[43]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a

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[40] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); and, *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[41] *Loopco Indus., Inc.*, supra, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[42] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[43] *Wing*, supra, 59 Ohio St.3d at 111.

trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[44]

LEGAL ANALYSIS

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants argue that the plaintiff is barred from bringing the present action by virtue of the doctrine of *res judicata*, specifically claim preclusion.

" * * * '[A] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.' "[45]

"The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel."[46] "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that

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[44] Civ.R.56(D); *Holeski v. Lawrence*, 85 Ohio App.3d 824, 834, 621 N.E.2d 802 (11th Dist.1993).
[45] *State ex rel. Schneider v. Board of Educ. of North Olmsted City School Dist.*, 39 Ohio St.3d 281, 281-282, 530 N.E.2d 206 (1988), quoting *Johnson's Island, Inc. v. Danbury Twp. Bd. of Trustees*, 69 Ohio St.2d 241, 243, 431 N.E.2d 672 (1982).
[46] *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995).

was the subject matter of a previous action."[47] "Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter."[48]

"For claim preclusion to apply, the parties to the subsequent suit must either be the same or in privity with the parties to the original suit."[49] "Privity was formerly found to exist only when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceeding."[50] "An interest in the result of and active participation in the original lawsuit may also establish privity."[51]

Further, a " 'mutuality of interest, including an identity of desired result,' might also support a finding of privity."[52] "Mutuality, however, exists only if 'the person taking advantage of the judgment would have been bound by it had the result been the opposite.'"[53] "In the end, 'privity 'is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.' "[54]

In *Buckner v. Washington Mut. Bank*, 12th Dist. Butler No. CA2014-01-012, 2014-Ohio-5189, the court found that Washington Mutual Bank and Chase Bank, which was the successor in interest to Washington Mutual Bank's loan assets, were in privity.[55] As such, because the Buckners were parties to both actions, there was an identity of

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[47] Id., citing *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998).
[48] Id., citing *Grava*, supra, 73 Ohio St.3d at 382.
[49] Id. at ¶ 9, citing *Johnson's Island, Inc.*, supra, 69 Ohio St.2d at 244.
[50] Id., citing *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 114, 254 N.E.2d 10 (1969), overruled in part on other grounds, *Grava*, supra, 73 Ohio St.3d 379.
[51] Id.
[52] Id., quoting *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958.
[53] Id., quoting *Johnson's Island, Inc.*, supra, 69 Ohio St.2d at 244.
[54] *Charvat v. GVN Michigan, Inc.*, 10th Dist. Franklin No. 09AP-1075, 2010-Ohio-3209, ¶ 16, quoting *State ex rel. Schachter v. Ohio Pub. Emp. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 27, quoting *O'Nesti*, supra, 2007-Ohio-1102 at ¶ 6.
[55] *Buckner*, supra, 2014-Ohio-5189 at ¶ 41.

parties between the action in that case and the 2010 foreclosure action filed by Chase Bank.[56]

The court also found that there was an identity of the causes of action between the 2010 foreclosure proceedings and more recent action brought by the Buckners.[57] The court noted that "[m]ultiple claims share an identity of the causes of action if the claims arise from a 'common nucleus of operative facts.'"[58]

In the more recent case, the Buckners brought suit against several parties, including Chase Bank and Washington Mutual Bank, seeking to challenge several aspects of the mortgage loan transaction.[59] The court held that these claims by the Buckners were barred because they related to the same nucleus of operative fact as the 2010 foreclosure proceedings which were based on that same mortgage loan.[60]

In the case at bar, Sims-Lohman was not in privity with the parties in the 2012 case. First, the contract for the construction of the defendants' home was between the defendants and Gold Point Custom Construction. Further, the 2012 case was a foreclosure on a mechanic's lien and Sims-Lohman and the other subcontractors were named as defendants only to assert any liens they may hold against the subject property. Sims-Lohman allowed its mechanics liens to expire and, as such, did not need to participate in the foreclosure action to protect the lien. Additionally, Sims-Lohman's action in this case does not demonstrate an identity of desired result with the previous

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[56] Id.
[57] Id. at ¶ 42.
[58] Id., quoting *Grava*, supra, 73 Ohio St.3d at 382.
[59] Id. at ¶ 43.
[60] Id. See also, *Buckner v. Bank of New York*, 12th Dist. Clermont No. CA2013-07-053, 2014-Ohio-568, ¶¶ 38-41 (The property was the subject of a prior foreclosure proceeding and the plaintiff succeeded that property owner's interest in the property. Therefore, the successor-in-interest could not attack the mortgage loan a second time and *res judicata* barred the action.).

case; instead, its claims in this case are individually tailored to its specific interests.[61] Furthermore, Sims-Lohman did not actively participate nor have any control over the 2012 suit.

There was obviously either an oral or, more likely, written contract between Gold Point Custom Construction and Sims-Lohman, as evidenced by the fact that it was Gold Point, not the defendants, who were invoiced for the materials and products provided by Sims-Lohman for the subject property. By virtue of the decision issued by Judge Haddad quoted above, it appears that Gold Point Custom Construction was seeking payment from the defendants for the amounts of those invoices in the 2012 case as part of the total damages claimed. However, the case was filed as an action on a mechanic's lien and Sims-Lohman was only named a defendant "because it could claim to have an interest in the real property by virtue of an Affidavit for Mechanics Lien * * *." Further, the court in the 2012 case decided that it would not award any amounts for the materials and products provided by Sims-Lohman and that, instead, the defendants should pay Sims-Lohman directly. Sims-Lohman was not a party to that foreclosure action and, as such, that court could not order the defendant to make such payment or enter an award in Sims-Lohman's favor in any amount.

As the plaintiff correctly points out in its memorandum, any claim it filed in the 2012 case would have been a cross-claim against the defendants. Pursuant to Civ.R. 13(G), cross-claims are permissive, not mandatory.[62] Therefore, Sims-Lohman would

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[61] See, e.g., *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007-Ohio-6594, 881 N.E.2d 294, ¶ 27, discussing *Brown*, supra, 89 Ohio St.3d at 248.

[62] Civ.R. 13(G) ("A party *may* state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.").

not have been required to file its cross-claim in the 2012 suit and instead could have filed a separate action, which is ultimately what occurred.[63]

Based on the above analysis, the court finds that the plaintiff's claims in the present case are not barred by *res judicata*.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

At the outset, the court would note that it will not address any argument made by the plaintiff regarding the court stating in the 2012 foreclosure case that the defendants should pay the plaintiff. The plaintiff cannot "have its cake and eat it too." The court has found that the plaintiff's claims are not barred by claim preclusion for the reasons set forth above. There was no jurisdiction by that court, as acknowledged by that court, to rule upon the issue of whether the defendants should be ordered to pay any monies to Sims-Lohman. Therefore, it logically and necessarily follows that any dicta in that court's decision addressing any monies owed to Sims-Lohman has no legal effect.

"In order to succeed on a claim of unjust enrichment, or quasi-contract, a plaintiff must prove the following elements: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment."[64]

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[63] See, e.g., *Wells Fargo Bank N.A. v. Michael*, 7th Dist. Belmont No. 12 BE 26, 2013-Ohio-2545, ¶ 18; and, *SunTrust Bank v. Wagshul*, 2nd Dist. Montgomery No. 25567, 2013-Ohio-3931, ¶ 9.

[64] *Hubbard v. Dillingham*, 12th Dist. Butler No. CA2002-02-045, 2003-Ohio-1443, ¶ 25, citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984).

In the case at bar, the plaintiff was the only party to submit affidavit evidence. Those affidavits establish that Sims-Lohman conferred a benefit on Timothy Pappas and Tracy Pappas, namely provided materials and products for the construction of their residence in the amount of $30,298.93. Sims-Lohman received a payment from Gold Point Custom Construction in the amount of $3,000.00, making the current principal amount due and owing $27,298.93. Shawn Bell averred that Timothy Pappas and Tracy Pappas specifically selected or approved the various products purchased from Sims-Lohman, thereby establishing that the defendants had knowledge of the benefit being conferred. Further, Roger Ollila recounted speaking to Tracy Pappas on two different occasions during which she acknowledged that there was no quality problem with the materials purchased from Sims-Lohman and that she was refusing to pay only because of the ongoing dispute with Gold Point Custom Construction.

The plaintiff provided products and materials chosen by the defendants for use in the construction of their home. It would be unjust to allow the defendants to retain the use of these items without tendering payment for them.

As such, the court finds that the plaintiff has established each of the elements of unjust enrichment and that there is no genuine issue of material fact remaining. The plaintiff is entitled to judgment as a matter of law on their claim for unjust enrichment in the amount of $27,298.93.

CONCLUSION

The defendants' motion for summary judgment is not well-taken and is hereby denied in its entirety.

The plaintiff's motion for summary judgment is well-taken and is hereby granted. The court finds that the plaintiff is entitled to judgment on its claim for unjust enrichment in the principal amount of $27,298.93.

The plaintiff indicates its complaint and its cross-motion for summary judgment that it is requesting prejudgment interest. The plaintiff is hereby ordered to file a motion for prejudgment interest and an accompanying memorandum addressing the legal issues involved by May 18, 2015. The defendants will then have until June 8, 2015 to file their own memorandum. The plaintiff may then file a reply memorandum by June 15, 2015 if it so chooses. Thereafter, the court will either issue a written decision or set the matter for oral argument or another type of hearing.

IT IS SO ORDERED.

DATED: 4-27-15

Judge Jerry R. McBride