COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

DONNA WOODS, ET AL.	:	
Plaintiffs	:	**CASE NO. 2015 CVH 01127**
vs.	:	**Judge McBride**
ICON ENVIRONMENTAL GROUP, LLC	:	**DECISION/ENTRY**
Defendant	:	

Nichols, Speidel & Nichols, Todd S. Stoffel, counsel for the plaintiffs Donna Woods and Kenneth R. Woods and third party defendant Suretec Insurance Company, 237 Main Street, Batavia, Ohio 45103

Doyle Hassman Law, Thomas P. Doyle, counsel for the defendant and third party plaintiff ICON Environmental Group, LLC, 526 York Street, Newport, Kentucky, 41071

This cause is before the court for consideration of a motion for partial summary judgment filed on June 1, 2016 by the plaintiffs Donna Woods and Kenneth R. Woods and the third party defendant Suretec Insurance Company.

The motion was supported by a memorandum, and a non-oral hearing was held on the motion on July 1, 2016. Pursuant to the court's case management order which was issued on December 9, 2015, the defendant filed a memorandum in opposition to the motion on July 14, 2016, and the plaintiffs and third party defendant filed a reply

memorandum on July 29, 2016. Neither side requested oral argument on the motion, and on August 5, 2016, the motion was taken under advisement.

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

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant motion for partial summary judgment deals with a mechanic's lien on the plaintiffs' property. The plaintiffs Donna Woods and Kenneth Woods own property at 1442 Woodville Pike, Loveland, Ohio 45140 (hereinafter refereed to as "the Property"), which is situated in Clermont County.[1] After a fire damaged the Property, on April 21, 2014 the plaintiffs entered into a contract with the defendant ICON Environmental Group, LLC to repair the Property and remediate the fire damage.[2]

On April 13, 2015, the plaintiffs terminated the defendant's services for its purported failure to perform the contract and its purported negligence in performing some work on the Property.[3]

On May 8th, the defendant filed an affidavit for mechanic's lien in the Clermont County Recorder's Office.[4] The affidavit for mechanic's lien reads as follows:

> "The undersigned Ashli Lindsley, being duly sworn, says that she is the Office Manager of Icon Environme ntal Group, LLC, an Ohio Limited Liability Corporation, whose address is 25 Whitney Dr., Suite D., Milford, OH 45150, and that Icon

[1] D. Woods Aff., ¶ 1, K. Woods Aff., ¶ 1.
[2] D. Woods Aff., ¶ 2, K. Woods Aff., ¶ 2.
[3] D. Woods Aff., ¶ 3, K. Woods Aff., ¶ 3.
[4] D. Woods Aff., ¶ 4, K. Woods Aff., ¶ 4, Pls. Ex. B.

> Environmental Group, LLC furnished certain material or performed certain labor or work in furtherance of improvements located on or removed to the land hereinafter described, in pursuance of a certain contract, with **Kenneth R & Donna Woods**, whose address is **2691 Locust View Rd, Goshen Oh 45122**. The first of said labor or work was performed and/or material was furnished on **23rd of July, 2014**. The last of the labor or work was performed and/or material was furnished on the **13th of April 2015** and there is justly and truly due Icon Environmental Group, LLC, therefore from **Kenneth R & Donna Woods** over and above all legal setoffs the sum of **Fifty One Thousand Forty Seven Dollars and 31 cents. ($51,047.21)**, for which Icon Environmental Group, LLC, claims a lien upon the land, building or leasehold, of which **Kenneth R & Donna Woods** is or was the owner, part owner, or lessee, as the case may be, which property is described as follows:
>
> Situated in the County of Clermont and State of Ohio and further described on Exhibit A attached hereto and made a part hereof.
>
> Known for street numbering purposes as **1442 Woodville Pike, Cincinnati Oh 45140 Parcel ID 114328.005.**"

The affidavit purports to be made by Ashli Lindsley as office manager of Icon Environmental Group, LLC. However, the affidavit is signed by Brittany Delaughter, and under her signature her name is printed and is designated as the defendant's manager. The notary public attested that the affidavit was sworn to before her and was signed on May 8, 2015, and the notary signed her name as "Barbara Brown." The notary did not stamp her seal on the affidavit.

In an affidavit submitted by the defendant, the affiant Barbara Brown avers that she is a notary public and that she witnessed Brittany DeLaughter sign the affidavit for

mechanic's lien.[5] Ms. Brown claims that she inadvertently failed to affix her notary seal to Ms. DeLaughter's affidavit.[6]

The mechanic's lien was dated May 8, 2015.[7] The plaintiffs aver that the defendant never served them with a copy of the mechanic's lien.[8] The plaintiffs further allege that the first time they received a copy of the mechanic's lien was on June 19, 2015, as it was enclosed as an attachment to a letter from the defendant's counsel.[9] However, in an email from the plaintiff Donna Woods to a manager at her insurance company dated May 18, 2015, Ms. Woods states: "On Saturday May 16, 2015 I received a letter from a [*sic*] attorney with a [*sic*] attachment of a mechanics lien [*sic*] that Icon has filed against the home."[10]

On August 26, 2015, the plaintiffs Donna Woods and Kenneth R. Woods filed a complaint against the defendant for breach of contract, negligence, and consumer sales violations, and asked for a declaratory judgment and damages. The plaintiffs' cause of action for a declaratory judgment claims as follows:

> "Plaintiffs seek a declaration of this court that the defendant ICON's mechanic's lien is void as a matter of law for its failure to comply with the Ohio Revised Code in the filing, perfection, recording, and service of the mechanic's lien all is [*sic*] more fully described above. Plaintiffs seek a declaration that the bond filed on behalf of the plaintiffs be discharged as the defendant's mechanic's lien is void."

The defendant answered and counterclaimed on October 6, 2015, naming Suretec Insurance Company as a third party defendant. The defendant's counterclaims

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[5] Defs. Ex. 2, to T. Doyle Aff.
[6] Defs. Ex. 2, to T. Doyle Aff.
[7] Pls. Ex. B.
[8] D. Woods Aff., ¶ 5, K. Woods Aff., ¶ 5.
[9] D. Woods Aff., ¶ 6, K. Woods Aff., ¶ 6.
[10] Defs. Ex. 1, to T. Doyle Aff.

include claims for breach of contract on two different contracts, unjust enrichment, tortious interference with a business relationship, tortious interference with a prospective business relationship, slander, and a request for a declaratory judgment.[11] The defendant's request for a declaratory judgment states as follows:

> "ICON requests this Court declare the lien it filed to protect its interests which is replaced by a bond in the amount of $76,571, a security of the claims of ICON against Plaintiffs/Counterclaim Defendants as valid and order SureTec Insurance Company to honor that bond and pay ICON for the damaged proved in this case."

On June 1, 2016 the plaintiffs and the third party defendant filed a motion for partial summary judgment against the defendant on the plaintiffs' cause of action for a declaratory judgment and on the defendant's cause of action for a declaratory judgment.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[12]

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[11] On November 3, 2015 the defendant voluntarily dismissed its claims for tortious interference with a business relationship, tortious interference with a prospective business relationship, and slander.

[12] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

The court must view the evidence in a light most favorable to the nonmoving party.[13] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[14] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[15]

Whether a genuine issue exists 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"?[16] This threshold inquiry determines whether 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."[17]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[18] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[19] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[20]

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[13] *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).
[14] *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).
[15] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[16] Id. at 251-52.
[17] Id. at 250.
[18] *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).
[19] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[20] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant 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.[21] The duty of the nonmoving party is more than that of resisting the motion's allegations.[22] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[23] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[24] It may not rely on the pleadings or unsupported allegations.[25]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[26] The trial court maintains the sound discretion to admit or exclude relevant evidence.[27] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[28]

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[21] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[22] *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 25 (12th Dist.).
[23] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[24] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[25] Id.
[26] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[27] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[28] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[29] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[30] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[31] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[32]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[33] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[34]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[35] If the affiant

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[29] Civ.R. 56(E); *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[30] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[31] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[32] Id.
[33] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[34] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[35] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

"relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[36]

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.[37] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[38]

LEGAL ANALYSIS

The motion for partial summary judgment filed by the plaintiffs and the third party defendant is directed toward the plaintiffs' demand for a declaratory judgment as well as the defendant's demand for a declaratory judgment.

It is the movants' position that the affidavit for mechanic's lien is void. The movants' motion sets forth three reasons as to why summary judgment is appropriate. Their first argument is that the plaintiffs were not served with a copy of the mechanic's lien within 30 days as required by R.C. 1311.07.[39] They next argue that the lien is invalid because the body of the affidavit for mechanic's lien names Ashli Lindsley as the affiant, but the affidavit is signed and sworn by Brittany Delaughter. Lastly, the movants

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[36] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau*, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[37] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[38] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[39] Pls. Mot. for Summ. J., pg. 3.

argue that the lien is void because the notary public did not append any of her information, including the expiration of her commission or seal.

"A mechanic's lien is a prioritized security interest in the amount of unpaid labor or materials provided on a contract."[40] Chapter 1311 of the Ohio Revised Code sets forth the applicable Ohio's mechanic's lien law.[41] "The mechanic's lien statutes are remedial legislation and are designed to protect the wage earner, furnisher of materials and contractor whose work, goods and skills create the structures to which the lien attaches."[42] A mechanic's lien "prevents the owner of the property from obtaining the benefit of its improvement and any consequent increase in its value at the expense of an unpaid laborer or material supplier."[43]

R.C. 1311.02 allows for the creation of mechanic's liens:

> "Every person who performs work or labor upon or furnishes material in furtherance of any improvement undertaken by virtue of a contract, express or implied, with the owner * * * of any interest in real estate * * * has a lien to secure the payment therefor upon the improvement and all interests that the owner * * * may have or subsequently acquire in the land or leasehold to which the improvement was made or removed."[44]

R.C 1311.06 sets forth the procedure for filing and perfecting a mechanic's lien:

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[40] *JJO Const., Inc. v. Penrod*, 8th Dist. Cuyahoga No. 93230, 2010-Ohio, ¶ 5.
[41] *Burroughs Framing Specialists, Inc. v. 505 W. Main St., L.L.C.*, 6th Dist. Ottawa No. OT-14-001, 2014-Ohio-3961, ¶ 12.
[42] *Burroughs Framing Specialists, Inc.*, 2014-Ohio-3961 at ¶ 16. *See JJO Const., Inc.*, 2010-Ohio-2601 at ¶ 6, citing Koprince, The Slow Erosion of Suretyship Principles: an Uncertain Future for "Pay-when-paid" and "Pay-if-paid" Clauses in Public Construction Subcontracts (2008), 38 Public Contract. L.J. 47, 50-51 ("The law permits the use of mechanic's liens in furtherance of two public policies: protecting those who have provided labor or materials on a construction project and serving as a penalty for owners of property who could benefit from labor or materials that remain unpaid.").
[43] *Guernsey Bank v. Milano Sports Ents. L.L.C.*, 177 Ohio App.3d 314, 2008-Ohio-2420, 894 N.E.2d 715, ¶ 25 (10th Dist.), citing *Fifth Third bank v. Dayton View Community Dev. Corp.*, 2d Dist. Montgomery No. 21696, 2007-Ohio-3806, ¶ 11.
[44] R.C. 1311.02.

> "Any person, or the person's agent, who wishes to avail self of sections 1311.01 to 1311.22 of the Revised Code, shall make and file for record * * * an affidavit showing the amount due over and above all legal setoffs, a description of the property to be charged with the lien, the name and address of the person to or for whom the labor or work was performed or material was furnished, the name of the owner, part owner, or lessee, if known, the name and address of the lien claimant, and the first and last dates that the lien claimant performed any labor or work or furnished any material to the improvement giving rise to the claimant's lien. * * * The affidavit may be verified before any person authorized to administer oaths * * *."[45]

In summary, under R.C. 1311.06 the affidavit for mechanic's lien must contain six items:

> "(1) the amount due over and above all legal setoffs, (2) a description of the property to be charged with the lien, (3) the name and address of the person to or for whom the labor or work was performed or material was furnished, (4) the name of the owner, part owner, or lessee, if known, (5) the name and address of the lien claimant, and (6) the first and last dates that the lien claimant performed any labor or work or furnished any material to the improvement giving rise to the lien."[46]

"Because R.C. 1311.06 creates a right in derogation of the common law, courts must strictly construe it when determining whether a lien attaches."[47] However, once "a valid mechanic's lien is established, the statutes governing it are to be liberally construed to effectuate their remedial purpose of protecting the laborer whose work, goods and skill created the structure to which the lien has been attached."[48] Moreover, under R.C. 1311.22, "Sections 1311.01 to 1311.22 of the Revised Code are to be construed liberally to secure the beneficial results, intents, and purposes thereof; and a

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[45] R.C. 1311.06(A).
[46] *Guernsey Bank*, 2008-Ohio-2420 at ¶ 26, citing R.C. 1311.06(A).
[47] *Guernsey Bank*, 2008-Ohio-2420 at ¶ 26, citing *Crock Constr. Co. v. Stanley Miller Constr. Co.*, 66 Ohio St.3d 588, 592, 613 N.E.2d 1027 (1993).
[48] *Fairfield Ready Mix v. Walnut Hills Associates, Ltd.*, 60 Ohio App.3d 1, 572 N.E.2d 114 (1st Dist. 1988), at paragraph two of the syllabus.

substantial compliance with those sections is sufficient for the validity of the liens under those sections, provided for and to give jurisdiction to the court to enforce the same."[49] Indeed, in applying this liberal construction to the requirements necessary to create and perfect a mechanic's lien, numerous courts have found that minor defects in a mechanic's lien do not vitiate its validity.[50]

Regarding service of a mechanic's lien, "[a]ccording to R.C. 1311.07, a person, who has filed an affidavit pursuant to R.C. 1311.06, must serve the owner with a copy of the affidavit within 30 days of its filing."[51] R.C. 1311.19 sets forth the methods of service for mechanic's lien affidavits:

> "(A) Except as otherwise provided in section 1311.11 of the Revised Code and division (C) of this section, any notice, affidavit, or other document required to be served under this chapter shall be served by one of the following means:
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> (1) The sheriff of the county in which the person to be served resides or maintains the person's principal place of business, in one or more of the methods provided in the Ohio Rules of Civil Procedure. The sheriff may charge reasonable fees for such service.
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> (2) Certified or registered mail, overnight delivery service, hand delivery, or any other method which includes a written evidence of receipt * * *."

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[49] R.C. 1311.22.

[50] *See Burroughs Framing Specialists, Inc.*, 2014-Ohio-3961 at ¶ 23 (finding that a mechanic's lien was valid where the affidavit "contained all of the information required by statute to create a mechanic's lien, although there was a clerical error with the year that the work was first and last performed by appellant."); *JJO Const., Inc.*, 2010-Ohio-2601 at ¶¶ 20-21 (holding that the lien affidavit was not rendered defective by listing the incorrect name for the property owner); *Queen City Lumber Co. v. O.G. Enterprise, Inc.*, 1st Dist. Hamilton No. C-820440, 1983 WL 8761, *2 (Mar. 30, 1983) (finding that a minor technical defect in the name of the owner on the affidavit did not invalidate the mechanic's lien).

[51] *Prater v. Dashkovsky*, 10th Dist. Franklin No. 07AP-389, 2007-Ohio-6785, ¶ 13. *See* R.C.1311.07.

If service is not made in the way prescribed by R.C. 1311.19(A), R.C. 1311.19(C) provides as follows:

> (C) A notice, affidavit, or other document required to be served under this chapter is considered served, whether or not the notice, affidavit, or other document was served by the means described in divisions (A)(1) to (3) of this section, and service is complete on the date the notice, affidavit, or other document is received, if either of the following is true regarding the notice, affidavit, or other document:
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> (1) The person served acknowledges receipt of the notice, affidavit, or other document.
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> (2) It can be proved by a preponderance of evidence that the person being served actually received the notice, affidavit, or other document."[52]

Courts have found the language in R.C. 1311.19(C) to be "clear: proof of service may be established by a preponderance of the evidence."[53]

Regarding errors contained in affidavits, "[c]ourts have held that affidavits are not necessarily fatally defective because of errors in notarizing them."[54] Indeed, a "jurat is not part of an affidavit, but is simply a certificate of the notary public who administered the oath, and is prima facie evidence that the affidavit was properly executed and sworn to before such notary public on the date stated in such affidavit."[55] Thus, the "seal itself

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[52] R.C. 1311.19(C).

[53] *Prater*, 2007-Ohio-6785 at ¶ 15. For instance, in *Prater*, the court held that the filing of a complaint, which included a cause of action for slander of title under a mechanic's lien, proved by a preponderance of the evidence that the party filing the complaint actually received the mechanic's lien affidavit, and thus R.C. 1311.19(C)(2) was satisfied.

[54] *Buckeye Lake Fireballs v. Leindecker*, 5th Dist. Licking No. 2010-CA-100, 2011-Ohio-1792, ¶ 26, citing *Stern v. Board of Elections of Cuyahoga County*, 14 Ohio St.2d 175, 237 N.E.2d 313 (1968). *See Anderson v. Mitchell*, 8th Dist. Cuyahoga No. 99876, 2014-Ohio-1058, ¶ 8 ("Nevertheless, courts have held that affidavits are not necessarily fatally defective because of errors in notarizing them.").

[55] *Stern v. Board of Elections of Cuyahoga County*, 14 Ohio St.2d 175, 237 N.E.2d 313 (1968), at paragraph one of the syllabus.

is not required to give effect to the official act of the notary * * *."[56] As such, when a seal is left off of the jurat, it is considered a "technical defect."[57] Furthermore, the "[f]ailure of a notary to print her name near her signature is not fatal * * *."[58]

Similarly, other "obvious clerical error[s]" do not necessarily invalidate an affidavit.[59] Indeed, the affidavit's "format" does "not affect the existence of facts based upon the affiant's knowledge."[60] When the body of the affidavit incorrectly identifies the affiant, such an error is considered an obvious clerical error that does not invalidate the affidavit.[61]

In the instant case, the movants' first argument in favor of summary judgment is that the defendant's mechanic's lien is void because it was improperly served under R.C. 1311.19. The movants submitted the affidavits of the plaintiffs Donna Woods and Kenneth R. Woods in support, in which they testified that they were never served a copy of the mechanic's lien, and that the first time they received a copy was on June 19, 2015, when it was enclosed as an attachment to a letter sent by the defendant's counsel.[62]

Thus, under the movants' argument, the defendant failed to serve the plaintiffs within 30 days from filing the lien, which was filed on May 8, 2015. As discussed, R.C.

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[56] Id. at 182.
[57] Id. *See City Commission of City of Gallipolis v. State*, 36 Ohio App. 258, 173 N.E. 36 (4th Dist. 1930), at the syllabus (finding that the absence of the notary public's seal did not vitiate an affidavit).
[58] *Liendecker*, 2011-Ohio-1792 at ¶ 26. *See In re Robinson*, 403 B.R. 497, 502 (Bankr.S.D.Ohio. 2008) (holding that an affidavit was not fatally defective where the notary did not affix a seal or print the notary's name where the signature was clear).
[59] *Chase Manhattan Mtg. Corp. v. Locker*, 2d Dist. Montgomery No. 19904, 2003-Ohio-6665, ¶ 27.
[60] *Locker*, 2004-Ohio-6665 at ¶ 27, citing *Boros v. O'Konshi*, 6th Dist. Lucas No. L-92-358, 1993 WL 372240, *4 (Sept. 24, 1993).
[61] *Locker*, 2004-Ohio-6665 at ¶ 27. *See Ulmer v. Portage Construction & Fitness Co.*, 26 Ohio N.P. (N.S.) 257, 300-301 (C.P. 1923).
[62] D. Woods Aff., ¶ 6, K. Woods Aff., ¶ 6.

1311.19(A) sets forth the methods of service for affidavits for mechanic's liens, which include service by the sheriff and certified or registered mail, overnight delivery service, hand delivery, or any other method which includes a written evidence of receipt.

The defendant has not submitted any evidence suggesting that it served the plaintiffs by the methods set forth in R.C. 1311.19(A). However, as the defendant highlights, R.C. 1311.19(A) also states that there lies an exception for service in R.C. 1311.19(C). That exception states that the affidavit for mechanic's lien is "considered served, whether or not * * * served by the means described in divisions (A)(1) to (3) of this section" if the "person served acknowledges receipt of the notice, affidavit, or other document," or "[i]t can be proved by a preponderance of evidence that the person being served actually received the notice, affidavit, or other document."[63]

The defendant has submitted evidence in the form of an email from the plaintiff Donna Woods dated May 18, 2015 stating: "On Saturday May 16, 2015 I received a letter from a [*sic*] attorney with a [*sic*] attachment of a mechanics lein [*sic*] that Icon has filed against the home."[64]

In the movants' reply brief, they take issue with the above email, stating: "In an attempt to create a genuine issue of material fact in connection with this issue, the defendant provides the court an unvetted email chain in an attempt to demonstrate defendant ICON complied with the above listed statute."[65] Contrary to the movants' argument, the emails at issue are properly before the court for its consideration in determining whether a genuine issue of material fact exists.

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[63] R.C. 1311.19(C).
[64] Defs. Ex. 1, to T. Doyle Aff.
[65] Pls. Reply, pg. 2.

As discussed, under Civ.R. 56(C), the only evidentiary materials that 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 any, timely filed in the action."[66] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit pursuant to Civ.R. 56(E).[67] A party's "failure to authenticate a document submitted on summary judgment renders the document void of evidentiary value."[68]

To properly introduce documents not enumerated under Civ.R. 56(C), Civ.R. 56(E) provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. * * *"

In the present case the defendant correctly introduced Ms. Woods's email chain by incorporating it by reference into a properly framed affidavit. Counsel for the defendant submitted an affidavit that averred that the attached Exhibit A, which was the email chain, was a true and accurate copy of documents the defendant received in discovery from the movants, citing to Bates numbers "WOODS 000330-000339." The

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[66] *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau*, 2011-Ohio-3904 at ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").

[67] *Lundwigsen v. Lakeside Plaza, L.L.C.*, 12th Dist. Madison No. CA2014-03-008, 2014-Ohio-5493, ¶ 24, citing *State ex rel. Anderson v. Obetz*, 10th Dist. Franklin No. 06AP–1030, 2008–Ohio–4064, ¶ 30.

[68] *Ludwigsen*, 2014-Ohio-5493 at ¶ 24, citing *Shampton v. Springboro*, 12th Dist. Warren No. CA98-02-014, 1999 WL 8361, *5 (Jan. 11, 1999).

attached Exhibit A bears the Bates numbers that the defendant's counsel described. Because the defendant properly submitted the emails, the court may consider them as evidence for summary judgment purposes.

These emails raise a genuine issue of material fact as to whether Ms. Woods has "acknowledged receipt of the notice," or alternatively, whether the defendant has shown by a preponderance of the evidence that the plaintiffs were served the affidavit. As such, the court finds that the movants' argument that summary judgment is warranted because the defendant did not properly serve the plaintiffs with the affidavit for mechanic's lien is without merit.

The movants' next argument as to why summary judgment is appropriate is that the affidavit for mechanic's lien is void because the name of the affiant in the body of the affidavit is different than the person who signed the affidavit under oath. As discussed, certain minor errors in an affidavit are considered technical errors and will not vitiate the affidavit's validity. As explained, the requirements enumerated in R.C. 1311.06 to create a mechanic's lien are strictly construed when determining if the lien attaches.[69] Once a valid mechanic's lien is established, then the mechanic's lien statutes are liberally construed to effectuate their remedial purpose of protecting the laborers.[70]

In the present case, the defendants have satisfied the six major requirements needed to establish a mechanic's lien on the plaintiff's Property under R.C. 1311.06. The affidavit for mechanic's lien (1) states the amount due as $51,047.31; (2) describes the property as 1442 Woodville Pike, Cincinnati, Ohio 45140, Parcel ID 114328.005 and

[69] *Guernsey Bank*, 2008-Ohio-2420 at ¶ 26, citing *Crock Constr. Co.*, 66 Ohio St.3d at 592.
[70] *Fairfield Ready Mix v. Walnut Hills Associates, Ltd.*, 60 Ohio App.3d 1, 572 N.E.2d 114 (1st Dist. 1988), at paragraph two of the syllabus.

attaches an additional description; (3) names the plaintiffs and their address as the persons for whom the work was performed; (4) names the plaintiffs as the owner of the Property; (5) names its own address as the lien claimant; and (6) provides the first and last days of the work, which were July 23, 2014 and April 13, 2015, respectively.[71] In short, the defendant included in its affidavit for mechanic's lien all of the statutorily required information necessary to establish and perfect a mechanic's lien under R.C. 1131.06.

The fact that the body of the affidavit incorrectly identifies the affiant as Ashli Lindsley, when the affiant under oath was actually Brittany Delaughter, is considered an obvious clerical error that does not invalidate the defendant's affidavit.[72] With all of the essential requirements for a mechanic's lien satisfied, the court finds that this technical error does not void the defendant's mechanic lien, and therefore the court will deny summary judgment on that argument.[73]

Finally, the movants argue that summary judgment should be granted in their favor, thereby invalidating the mechanic's lien, because the notary public did not use her seal or print her name on the jurat. However, "affidavits are not necessarily fatally defective because of errors in notarizing them."[74] Indeed, the jurat, which follows the affidavit and bears the notary public's signature and seal, is not actually part of the

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[71] *Guernsey Bank*, 2008-Ohio-2420 at ¶ 26, citing R.C. 1311.06(A).
[72] *See Locker*, 2004-Ohio-6665 at ¶ 27.
[73] *See Burroughs Framing Specialists, Inc.*, 2014-Ohio-3961 at ¶ 23; *JJO Const., Inc.*, 2010-Ohio-2601 at ¶¶ 20-21; *Queen City Lumber Co.*, 1983 WL 8761 at *2.
[74] *Buckeye Lake Fireballs*, 2011-Ohio-1792 at ¶ 26, citing *Stern*, 14 Ohio St.2d 175. *See Anderson*, 2014-Ohio-1058 at ¶ 8.

affidavit.[75] Other courts have found that a lack of seal or printed name is a mere technical defect that will not invalidate the affidavit when the signature is legible.[76]

In this case the notary public's signature clearly and legibly reads "Barbara J. Brown." The court understands that the movants read the name as "Brain." However, the supposed letter "i" is not dotted, and the vowel does not appear to be an "a" when comparing it to the three "a's" in the word Barbara. Further, the vowel does not appear to be the letter "u" because it is closed at the top. As a result, the only other vowel that it could be is an "o," and it is apparent that the notary simply failed to create any space between the letters "o" and "w". Accordingly, the court finds that the mechanic's lien is not void because the notary public failed to affix her seal or print her name on the jurat to the affidavit.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiffs and third party defendant's motion for partial summary judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 9-14-16

Judge Jerry R. McBride

[75] *Stern*, 14 Ohio St.2d at paragraph one of the syllabus.
[76] Id. at 182. *See City Commission of City of Gallipolis*, 36 Ohio App. at the syllabus; *Liendecker*, 2011-Ohio-1792 at ¶ 26; *In re Robinson*, 403 B.R. at 502.