

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

APPELLATE DIVISION (CIVIL)
Case No.: 502012CA004510XXXXMB
L.T.: 502011CC10512XXXXNB
Division: 'AY'

TNT BUILDERS OF SOUTH FLORIDA, LLC.,

Petitioner,

v.

CHRISTOPHER KUEBLER, SUSAN KUEBLER,
AND TREASURE COAST CONSTRUCTION &
REMOLDING, LLC.,

Respondent(s).

Opinion filed: DEC 19 2012

✓ **Appeal from the County Court in and for Palm Beach County,
Judge Laura Johnson.**

✓ For Petitioner: John A. Hockin, Esq.
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✓ For Respondents: Barry W. Taylor, Esq.
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PER CURIAM.

Petitioner seeks a writ of certiorari review requesting that the Court reverse the trial court's Motion for Partial Summary Judgment as to Count 1, Foreclosure of Construction lien, of the Amended Complaint. We conclude that Petitioner has not presented an issue that invokes this Court's certiorari jurisdiction.

Petitioner sued Respondents, Christopher and Susan Kuebler (collectively the "Homeowners"), to foreclose on its construction lien as well as for unjust enrichment. Petitioner also sued the contractor, Treasure Coast Construction & Remolding, LLC, for breach of contract. The Homeowners filed a Motion for Partial Summary Judgment as to Count 1 of the Amended Complaint, claiming that it did not receive the Notice to Owner, which is required for a lienor not in privity with the owner to perfect its lien, pursuant to section 713.06(2)(a), Florida Statutes. In support of their motion, the Homeowners submitted an affidavit solely from Christopher Kuebler attesting that he never received the Notice to Owner. In response, Petitioner submitted an affidavit from Nicole McGuire, the office manager, attesting that she did in fact send the Notice to Owner via regular US Postal Service mail. After a hearing on the motion, the trial court granted the Homeowners' Motion for Partial Summary Judgment, and Petitioner filed this petition.

This Court finds that the Order under review is non-final and non-appealable. It does not fit under any of the categories set out in Florida Rule of Civil Procedure 9.130 for review of non-final orders. *See* Fla. R. Civ. P. 9.130; *see also Stein v. Hospital Corp. of America*, 481 So. 2d 1264, 1265 (Fla. 4th DCA 1986). A non-final order for which no appeal is provided by Florida Rules of Appellate Procedure 9.130 is reviewable by petition for certiorari only in limited circumstances. *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987), *superseded by statute on other grounds*, § 768.72, Fla. Stat. (1989). Before an appellate court can grant relief from an interlocutory order, a petitioner must establish (1) a departure from the essential requirements of law, (2) resulting in material injury for the remainder of the trial, (3) that cannot be corrected on post judgment appeal. *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d DCA 1995). The first element is directed to the merits of the petition, while the second and third elements constitute a jurisdictional test. *Id.* at 649. However, before deciding whether the non-final order passes the standard of review, i.e., whether the order is a "departure from the essential requirements of law," an appellate court should conduct the jurisdictional analysis. *Id.*

Examining the two jurisdictional prongs in this case, it is clear that neither is satisfied. The lower court has yet to enter a final judgment in the underlying case. Specifically, this Court finds that the Order under review does not discharge the construction lien at issue. Thus, the challenged Order does not cause any material injury throughout the remainder of the proceeding. More importantly, once the trial court enters a final judgment effectively discharging Petitioner's construction lien, the matter can be remedied on postjudgment appeal. Absent more, we conclude that the Petitioner has not invoked this Court's certiorari jurisdiction.

Although we dismiss this petition for lack of jurisdiction, we note that an issue of material fact does exist. Section 713.18(4), Florida Statutes, states: "[i]f the real property is owned by more than one person or a partnership, a lienor may serve any notices or other papers under this part on any of such owners or partners, and such notice is deemed notice to all owners and partners." § 713.18(4), Fla. Stat. (2011); see *Sasso Air Conditioning, Inc. v. United Companies Lending Corp.*, 742 So. 2d 468, 470 (Fla. 4th DCA 1999) (recognizing that a husband and wife can bind each other under the provisions of the lien law).

In the instant case, the record evidence only demonstrates that Christopher Kuebler submitted an affidavit stating that he never received the Notice to Owner as required by section 713.06(2)(a). However, Susan Kuebler did not submit an affidavit stating that she too did not receive the Notice to Owner. Without an affidavit stating otherwise, Susan Kuebler may have received the Notice to Owner constituting notice on Christopher Kuebler. Therefore, we note that an issue of fact exists as to whether the Notice to Owner was in fact received by the Homeowners.

Nonetheless, we conclude that the Petition for Writ of Certiorari is **DISMISSED** for lack of jurisdiction.

Kastrenakes, Crow, and Cox, JJ., concur.