STATE OF MICHIGAN

COURT OF APPEALS

SCHAFER CONSTRUCTION, INC.,

Plaintiff/Counter-Defendant-Appellee,

and

STANDARD ELECTRIC COMPANY,

Intervening Plaintiff-Appellee

v

RBBC INVESTMENTS, LLC, a/k/a RBBC ENTERPRISES, LLC,

Defendant/Cross-Defendant,

BM INVESTMENTS, LLC,

Defendant/Counter-Plaintiff/Cross-Defendant,

HAMILTON FAMILY LIMITED PARTNERSHIP,

Defendant-Appellant,

DEXTERITY CONSTRUCTION COMPANY, INC., and PREMIER TITLE, INC.,

Defendants,

MJR MECHANICAL, INC., and DESIGN COMFORT COMPANY, INC.,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs-Appellees,

and

UNPUBLISHED
March 3, 2009

No. 279910
Livingston Circuit Court
LC No. 05-021240-CZ

S&G ERECTORS, INC., and POURED BRICKED WALLS, INC.,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs.

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ

PER CURIAM.

Defendant Hamilton Family Limited Partnership (Hamilton) appeals as of right the trial court's judgment of foreclosure issued after a bench trial. Specifically, Hamilton appeals the trial court's holding that the constructions liens of plaintiff Schafer Construction, Inc., intervening plaintiff Standard Electric Company, and defendants MJR Mechanical, Inc., and Design Comfort Company, Inc., (Design Comfort) have priority over its mortgage. Because we conclude that the trial court made no error in concluding that the construction liens were valid and had priority over Hamilton's mortgage, we affirm.

I. Basic Facts and Procedural History

Schafer Construction contracted with RBBC Investments, LLC, (RBBC) to manage the construction of the Cedar Creek Centre (or the Centre), which was to be built at 8049 Country Corner (the property) in Fowlerville, Michigan. The date of the first actual physical improvement to the property was May 6, 2004. MJR Mechanical contracted with Schafer Construction to furnish and install plumbing materials in the Centre, and Design Comfort contracted with Schafer Construction to provide and install heating and cooling systems. Standard Electric provided materials to Mike Landry's Electrical Services (Landry), a subcontractor of Schafer Construction.

On October 8, 2004, RBBC sold the Cedar Creek Centre to BM Investments, which had borrowed approximately $2.2 million from Hamilton for the purchase. BM Investments granted Hamilton a mortgage to the property. Hamilton recorded its mortgage on October 14, 2004. Although it was not under contract with BM Investments, Schafer Construction continued to manage the construction of the Cedar Creek Centre after the sale of the Centre to BM Investments. However, it ceased work on the Centre, which was then 95 percent complete, on November 13, 2004. Thereafter, Schafer Construction, along with MJR Mechanical, Design Comfort, and Standard Electric, (the lien claimants) filed construction liens against the property. In March 2006, to avoid foreclosure of the property, BM Investments deeded title of the property to Hamilton.

Following a bench trial, the trial court found that the lien claimants had complied or substantially complied with the Construction Lien Act (CLA), MCL 570.1101 *et seq.* The trial court held, pursuant to MCL 570.1119(3), that because Hamilton recorded its mortgage subsequent to the first actual physical improvement to the property, the liens of Schafer Construction, MJR Mechanical, Design Comfort, and Standard Electric had priority over Hamilton's mortgage.

II. Standard of Review

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

III. Sworn Statements

Hamilton first claims that, because the sworn statements that were introduced into evidence by Schafer Construction failed to comply with MCL 570.1110(4), the trial court erred in relying on the sworn statements to find a valid construction lien. Hamilton further argues that, because no complaint for foreclosure may be commenced until a sworn statement has been provided, MCL 750.1110(9), and because proceedings to enforce a construction lien must be commenced within one year after the date the claim of lien was recorded, MCL 570.1117(1), Schafer Construction's complaint for foreclosure was barred by the statute of limitations. Similarly, Hamilton claims that, because MJR Mechanical, Design Comfort, and Standard Electric failed to introduce into evidence sworn statements that complied with MCL 750.1110(4), and because their complaints were filed more than one year after the claims of lien were recorded, the cross-claims for foreclosure were barred by the statute of limitations.

Below, Hamilton argued that the construction lien of Schafer Construction was invalid, but its argument was based on the fact that Schafer Construction did not have a contract with BM Investments. Hamilton also argued below that the liens of MJR Mechanical and Design Comfort were invalid, but its argument was that, because Schafer Construction entered into contracts with MJR Mechanical and Design Comfort on October 8, 2004, and because Schafer Construction did not have a contract with BM Investments on that date, Schafer Construction could not obligate either RBBC or BM Investments to pay MJR Mechanical and Design Comfort. Hamilton claimed below that Standard Electric did not have a valid lien because it had contracted with Landry, who had been paid in full by Schafer Construction, and because it had engaged in a fraud when it billed for materials after the Centre had been completed. Hamilton raised no argument below that the liens of Schafer Construction, MJR Mechanical, Design Comfort, and Standard Electric were invalid because the lien claimants failed to introduce or provide sworn statements that complied with MCL 750.1110(4). An issue is not properly preserved for appellate review if it was not raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). This Court is not obligated to address issues first raised on appeal. *Michigan Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; __ NW2d __ (2008).

Nonetheless, we consider in seriatim whether the construction liens of Schafer Construction, MJR Mechanical and Design Comfort, and Standard Electric should be declared invalid because of the lien claimants' failure to introduce sworn statements that complied with MCL 570.1110(4).

A. Schafer Construction

A sworn statement must be in substantially the same form as set forth in the statutory exemplar. MCL 570.1110(4). The exemplar requires that a sworn statement be signed and sworn to before a notary. *Id.*; *Big L Corp v Courtland Constr Co*, 278 Mich App 438, 442; 750

NW2d 628 (2008), vacated in part on other grounds __ Mich __ (2008). The sworn statements introduced into evidence by Schafer Construction were neither signed nor sworn to before a notary. However, Hamilton consented to the admission of the sworn statements. "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). By consenting to the admission of the sworn statements into evidence, Hamilton cannot now argue that the trial court erred in relying on the sworn statements to determine that Schafer Construction had a valid construction lien. To allow Hamilton to make such an argument, especially when it never asserted below that the sworn statements failed to comply with MCL 570.1110(4), would be contrary to this Court's longstanding rule against harboring error as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).[1] Accordingly, we reject Hamilton's argument that, because Schafer Construction failed to introduce sworn statements that complied with MCL 570.1110(4), the construction lien of Schafer Construction was invalid.[2]

B. MJR Mechanical and Design Comfort

"A subcontractor shall provide a sworn statement to the contractor when payment is due to the subcontractor from the contractor or when the subcontractor requests payment from the contractor." MCL 570.1110(3). In addition, "[a] subcontractor shall provide a sworn statement to the owner or lessee when a demand for the sworn statement has been made by or on behalf of the owner or lessee . . . ." MCL 570.1110(2). At trial, MJR Mechanical and Design Comfort did not introduce any sworn statements into evidence. However, Schafer Construction, while admitting that it had not paid MJR Mechanical and Design Comfort for all the improvements the two subcontractors had made to the Cedar Creek Centre, never asserted that either of the subcontractors had failed to provide sworn statements either when demanding payment or when payment was due. Further, there was no evidence presented that the owner of the Centre, either RBBC or BM Investments, had ever demanded a sworn statement from MJR Mechanical or Design Comfort. Accordingly, as no party asserted that either MJR Mechanical or Design Comfort failed to provide sworn statements as required by the CLA, there was no reason for MJR Mechanical or Design Comfort to introduce sworn statements into evidence. Consequently, a conclusion by this Court that MJR Mechanical and Design Comfort failed to provide sworn

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[1] The September 30, 2004 sworn statement introduced into evidence by Schafer Construction was not signed nor sworn to before a notary. However, the September 30, 2004 sworn statement that was contained in the two sets of documentary evidence that Hamilton attempted to introduce was signed and sworn to before a notary. See *infra* n 7. Therefore, considering the entire record before this Court, we question whether the sworn statements introduced into evidence by Schafer Construction were exact replicas of the sworn statements provided to RBBC and BM Investments.

[2] We also reject Hamilton's argument that, because Schafer Construction failed to allege in its complaint, contrary to MCL 570.1117(7), that it had provided sworn statements to the owner of the Cedar Creek Centre, the construction lien of Schafer Construction was invalid. The trial court granted Schafer Construction's motion to amend the complaint to allege that sworn statements had been provided.

statements that complied with the CLA would be speculation. We will not invalidate the construction liens of MJR Mechanical and Design Comfort on such speculation.

C. Standard Electric

Contractors and subcontractors are required to provide sworn statements either when demanding payment or when the property owner demands a sworn statement. MCL 570.1110(1), (2), (3).[3] However, no provision in MCL 750.1110 requires a supplier to provide a sworn statement. A "subcontractor" is "a person, other than a laborer *or supplier*, who pursuant to a contract between himself or herself and a person other than the owner or lessee performs any part of a contractor's contract for an improvement." MCL 570.1106(5) (emphasis added). A "supplier" is "a person who, pursuant to a contract with a contractor or a subcontractor, leases, rents, or in any other manner provides material or equipment that is used in the improvement of real property." MCL 570.1106(6).

According to Joseph Reinig, credit manager of Standard Electric, and William Binford, an owner of BM Investments, Standard Electric contracted with Landry to supply Landry with all the necessary electrical material for the Cedar Creek Centre. Landry, a subcontractor of Schafer Construction, was "to perform all the electrical [work] for the" Centre. Because Standard Electric contracted with a subcontractor to provide the electrical material that was to be used in the improvement of the property, Standard Electric was a supplier. As a supplier, Standard Electric was not required to supply sworn statements. Therefore, Hamilton's argument that, because Standard Electric failed to introduce sworn statements that complied with MCL 570.1110(4), Standard Electric's lien was invalid is without merit.[4]

IV. Equitable Subrogation

Hamilton next claims that, pursuant to the doctrine of equitable subrogation, it should have been subrogated to the priority position of Brighton Commerce Bank (Brighton), the lender to RBBC. We disagree.

A mortgage that is recorded before the first actual physical improvement to real property has priority over a construction lien arising under the CLA. MCL 570.1119(4). Brighton recorded its mortgage on February 26, 2004. Because the first actual physical improvement to the property did not occur until May 6, 2004, Brighton's mortgage had priority over any construction lien. Hamilton claims that, because the money it loaned to BM Investments was used to pay off the loan secured by Brighton's mortgage, it is entitled to be subrogated to the priority position of Brighton.

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[3] A "contractor" is "a person who, pursuant to a contact with the owner or lessee of real property, provides an improvement to real property." MCL 570.1103(5). Standard Electric, who did not contract with either RBBC or BM Investments, is not a contractor.

[4] If Standard Electric was a subcontractor, we would not invalidate its construction lien based on its failure to introduce sworn statements into evidence for the same reasons that we refuse to invalidate the construction liens of MJR Mechanical and Design Comfort.

"'Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.'" *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999), quoting *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986) (opinion of Williams, C.J.). The subrogee may not be a "mere volunteer." *Id.* "In order to be entitled to subrogation, a subrogee cannot voluntarily have made payment, but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor." *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 95; 731 NW2d 99 (2006).

In *Washington Mut Bank, FA v Shorebank Corp*, 267 Mich App 111, 119-120; 703 NW2d 486 (2005), this Court stated:

> We are obligated to follow the most recent pronouncement of the Supreme Court on a principle of law. The most recent pronouncement of the Supreme Court on this topic would certainly seem to be that the doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older mortgagee merely because the proceeds of the new mortgage were used to pay off the indebtedness secured by the older mortgage. It is clear to us that . . . plaintiff is a mere volunteer and, therefore, is not entitled to equitable subrogation. [Citation omitted.]

The proceeds of the loan secured by Hamilton's mortgage were used to pay off the loan secured by Brighton's mortgage. Hamilton has presented no argument that it was required to advance the loan proceeds to fulfill a legal or equitable duty. Accordingly, Hamilton is a "mere volunteer." As such, Hamilton is not entitled to be subrogated to the priority position of Brighton. *Id.*

V. Notices of Furnishing

A

Hamilton argues that, because MJR Mechanical and Standard Electric failed to provide notices of furnishing within 20 days of first providing labor or furnishing supplies, the construction liens of MJR Mechanical and Standard Electric should have priority no earlier than the dates the untimely notices were provided. And, because Hamilton's mortgage was recorded before either MJR Mechanical and Standard Electric provided a notice of furnishing, Hamilton argues that its mortgage has priority over the liens of MJR Mechanical and Standard Electric.

Generally, a subcontractor or a supplier is required to provide a notice of furnishing to the owner of the property and the general contractor within 20 days after first providing labor or furnishing material. MCL 570.1109(1); *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 122; 560 NW2d 43 (1997). MJR Mechanical provided its notice of furnishing on November 16, 2004, which was more than 20 days after it first ordered materials for the Cedar Creek Centre on September 7, 2004, or when it first provided labor at the Centre on September 9,

2004. Standard Electric provided its notice of furnishing on October 14, 2004, 21 days after it first provided materials to Landry on September 23, 2004.[5] Accordingly, we agree with defendant that MJR Mechanical and Standard Electric failed to provide timely notices of furnishing.

A construction lien arising under the CLA relates back to the date of the first actual physical improvement to the property and has priority over all interests recorded after the first actual physical improvement. MCL 570.1119(3); *M D Marinich, Inc, v Nat'l Bank*, 193 Mich App 447, 454; 484 NW2d 738 (1992). To support its argument that the priority of the construction liens of MJR Mechanical and Standard Electric relates back to the date the untimely notices of furnishing were provided, rather than the date of the first actual physical improvement to the property, Hamilton relies on MCL 570.1109(5), which provides:

> The failure of a lien claimant to provide a notice of furnishing within the time specified in this section *shall not defeat* the lien claimant's right to a construction lien for work performed or materials furnished by the lien claimant after the service of the notice of furnishing. [Emphasis added.]

The word "defeat" "impl[ies] some kind of outright negation," and, as used in the CLA, it "refers not to priority but to existence." *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 199; 706 NW2d 878 (2005). Accordingly, MCL 570.1109(5) does not speak to the priority of a construction lien. Rather, the statute states that the failure of a lien claimant to provide a timely notice of furnishing does not negate the claimant's right to a construction lien for work performed or materials furnished after the notice of furnishing was provided.

In addition, the failure to provide a timely notice of furnishing does not defeat, or negate, a lien claimant's right to a lien for labor provided or materials furnished *before* the untimely notice of furnishing was provided. See MCL 570.1109(6), which provides:

> The failure of a lien claimant to provide a notice of furnishing within the time specified in this section shall not defeat the lien claimant's right to a construction lien for work performed or materials furnished by the lien claimant before the service of the notice of furnishing except to the extent that payments were made by or on behalf of the owner or lessee to the contractor pursuant to either a contractor's sworn statement or a waiver of lien in accordance with this act for work performed or material delivered by the lien claimant. This section does not apply to a laborer.

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[5] We reject Hamilton's argument that no evidence supports the trial court's finding that Standard Electric provided its notice of furnishing on October 14, 2004. At trial, Hamilton and Standard Electric stipulated that the notice of furnishing was provided on October 14, 2004. "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Pursuant to MCL 570.1109(6), a lien claimant's failure to provide a timely notice of furnishing reduces the amount of the lien by the amount that the owner had already paid for the claimant's labor or materials before the notice of furnishing was provided, as long as the payments were made pursuant to a sworn statement or waiver of lien. *Vugterveen Sys, Inc, supra* at 123; *Schuster Constr Services, Inc v Painia Dev Corp*, 251 Mich App 227, 235; 651 NW2d 749 (2002).

Accordingly, Hamilton's argument that, because MJR Mechanical and Standard Electric failed to provide timely notices of furnishing, their liens should be given priority only to the dates the notices of furnishing were provided, rather than to the date of the first actual physical improvement of the property, is misplaced. Hamilton has misconstrued MCL 570.1109(5) as governing the priority of a construction lien held by lien claimant who failed to provide a timely notice of furnishing. We, therefore, reject Hamilton's argument that the construction liens of MJR Mechanical and Standard Electric should have priority only as of November 16, 2004, and October 14, 2004, respectively.

B

Hamilton also claims that the trial court erred in granting priority to Standard Electric's construction lien because Standard Electric did not file its notice of furnishing until six days after RBBC sold the property to BM Investments. Hamilton has provided no legal authority to support its position. Accordingly, we deem the issue abandoned and decline to address it. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).[6]

VI. Exclusion of Documentary Evidence

Hamilton next claims the trial court erred in excluding two sets of documentary evidence, which included a September 30, 2004 sworn statement, that would have established the priority of its mortgage and offsets for monies already paid to MJR Mechanical and Design Comfort. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Error in the exclusion of evidence does not warrant appellate relief unless the error affected a substantial right of a party. MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

The trial court excluded the proffered evidence, which Hamilton identified as "the draws from Brighton Commerce Bank" and "the sale of the premises from RBBC to BM Investments,"

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[6] We note that, if Hamilton's mortgage is granted priority over Standard Electric's lien simply because Standard Electric did not provide its notice of furnishing before the sale of the Cedar Creek Centre, then even if Standard Electric had complied with MCL 570.1109(1) and provided a timely notice of furnishing but after the sale of the Centre, Standard Electric's lien would not be given priority over the mortgage of Hamilton. Hamilton has provided no authority to suggest that the Legislature intended that outcome.

because Hamilton had obtained the documentary evidence approximately five minutes before it attempted to introduce the documents into evidence. The objective of discovery is to make available to all parties, in advance of trial, all relevant facts that might be admitted into evidence at trial. *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778; 404 NW2d 665 (1987). Discovery is intended to avoid trial by surprise. *Id.* at 779. By obtaining the documentary evidence only minutes before it attempted to introduce the documents into evidence, Hamilton took Schafer Construction by surprise. In addition, there is no indication in the record that Hamilton could not have obtained the evidence during the discovery period, nor is there any indication that Hamilton sought to obtain the documents during discovery and was unable to obtain them. Under these circumstances, along with the fact that the proffered evidence consisted of more than 130 pages, the trial court's decision to exclude the two sets of documents did not fall outside the range of principled outcomes. *Barnett, supra*.

Further, Hamilton's argument on appeal is centered on the exclusion of the September 30, 2004 sworn statement that was contained in the second set of proffered documents. However, a copy of the sworn statement had already been admitted into evidence by Schafer Construction. We, therefore, fail to see how the trial court's exclusion of the sworn statement prejudiced Hamilton.[7] Hamilton offers no explanation why it could not have used the September 30, 2004 sworn statement that was admitted into evidence to establish the priority of its mortgage or the offsets for monies already paid to MJR Mechanical and Design Comfort. Accordingly, even if the trial court abused its discretion in excluding the proffered evidence, Hamilton has not shown that the trial court's error affected its substantial rights. MRE 103(a); *Craig, supra*.

VII. Credits for Prior Payments

Finally, Hamilton argues that, because at the October 8, 2004 closing, it dispersed a check to Schafer Construction in the amount of $343,444, an amount that was based on the September 30, 2004 sworn statement, which included claims for amounts owed to MJR Mechanical and Design Comfort, it is entitled to a credit for those amounts.

Michael Duggan, vice-president of MJR Mechanical, acknowledged that it had received from Schafer Construction the amount that was listed as owed on the sworn statement.[8] Similarly, Peter Rossi, business manager for Design Comfort, testified that Design Comfort had received substantially more from Schafer Construction than the amount that was listed as owed on the sworn statement.[9] However, both MJR Mechanical and Design Comfort worked on the

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[7] The only distinction between the two sworn statements was that the statement admitted into evidence by Schafer Construction was not signed and sworn to before a notary, while the statement contained in the proffered documentary evidence was signed and sworn to before a notary.

[8] The sworn statement listed a claim of $20,460 for MJR Mechanical. Duggan acknowledged that MJR Mechanical had received $18,414 from Schafer Construction. Retention in the amount of $2,046 for MJR Mechanical's claim was withheld.

[9] The amount listed as owed on the sworn statement was $4,600. Rossi testified that Design Comfort had received $31,140 from Schafer Construction.

Cedar Creek Centre after the date of the closing. At trial, Hamilton did not question either Duggan or Rossi regarding whether the amounts that were still owed to MJR Mechanical and Design Comfort were for work performed before or after the date of the sworn statement. Thus, there is no evidence in the record to establish that the amounts of the construction liens of MJR Mechanical and Design Comfort included the amounts that were listed as owed on the sworn statement. Accordingly, we reject Hamilton's argument that it is entitled to credits for monies paid to MJR Mechanical and Design Comfort.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra