

STATE OF MICHIGAN
COURT OF APPEALS

KOMISAR & SONS INC,

Plaintiff/Counter-
Defendant/Appellee,

v

ARMOND GUBBINI,

Defendant/Cross-
Defendant/Appellee,

and

BREN'S ELECTRIC INC,

Defendant/Cross-
Defendant/Appellee,

and

MICHIGAN MATERIALS & AGGREGATES
COMPANY, doing business as STONECO OF
MICHIGAN,

Defendant/Cross-Defendant/Third-
Party-Plaintiff/Appellee,

and

MICHIGAN PIPE AND VALVE—TRAVERSE
CITY LLC,

Defendant/Cross-Defendant/Third-
Party-Plaintiff/Appellee,

and

TRUCKING SPECIALISTS INC,

UNPUBLISHED
September 23, 2010

No. 292060
Monroe Circuit Court
LC No. 08-025030-CH

Defendant/Cross-
Defendant/Appellee

REAL ESTATE 3000 INC,

Defendant/Counter-Plaintiff/Cross-
Plaintiff/Cross-Defendant/Appellant,

and

MICHAEL KOMISAR,

Third-Party-Defendant,

and

KRISTY KAKOCZKI, as known as KRISTY
TIMBROOKS,

Third-Party-Defendant,

and

MONROE COUNTY TREASURER,

Third-Party-Defendant.

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

In this construction lien case, Real Estate 3000 Inc, (appellant) appeals as of right the circuit court's decision granting summary disposition in favor of appellees Komisar & Sons Inc, (Komisar), Michigan Materials & Aggregates Company, doing business as Stoneco of Michigan (Stoneco), Trucking Specialists Inc, (Trucking Specialists), and Michigan Pipe & Valve-Traverse City LLC, (Michigan Pipe). We affirm.

I. BASIC FACTS AND PROCEEDINGS

On August 16, 2004, Armond Gubbini (Gubbini) acquired a deed to 28.952 acres of undeveloped real estate (parent parcel) located in Ash Township. The parent parcel was eventually divided into seven parcels, on some of which residential homes were constructed and sold to third parties.

In September 2005, Gubbini sold a portion of the parent parcel to the Eddie and Rita Gilland, thus creating two separate parcels, hereinafter the “Gilland parcel,” and the “Gubbini parcel.” The Gubbini parcel would be subdivided into six parcels to accommodate residential homes. On October 19, 2005, appellant loaned Gubbini \$80,000 and in exchange received a mortgage on the Gubbini parcel. On December 14, 2005, appellant loaned Gubbini another \$45,000 and in exchange received a second mortgage on the Gubbini parcel.

On or around May 5, 2005 Bush & Son Grading & Excavating, Inc, (Bush & Sons) made improvements to the parent parcel. Notably, appellant maintains that, had the parent parcel been divided, these improvements would only have been made to the Gilland parcel. In October 2006, Gubbini contracted with Trucking Specialists and Komisar to develop several residential homes on parcels of land within the Gubbini parcel. Komisar in turn subcontracted with Michigan Pipe and Stoneco to perform a portion of this work.

Komisar, Trucking Specialists, Michigan Pipe and Stoneco performed work on residential homes with the Gubbini parcel. They were not fully paid and each eventually filed construction liens against various parcels that they had improved within the Gubbini parcel.

Komisar then filed the instant complaint seeking to foreclose on its construction lien. Trucking Specialists, Michigan Pipe and Stoneco answered and filed claims to foreclose their own respective liens. Appellant also filed a claim to foreclose on first and second mortgages. Komisar first filed a motion for summary disposition, which prompted Trucking Specialist and appellant to file motions for summary disposition of their own.

The circuit court held a hearing on the collective motions. The court held that the construction liens had priority over appellant’s mortgages. The court found that despite appellant’s contention that Bush & Sons did not perform work on the parcels of land that Komisar, Trucking Specialists, Michigan Pipe and Stoneco sought to foreclose upon, the construction liens nonetheless attached to the entire parent parcel because it had not yet been divided when Bush & Sons made the first improvements. The court later entered a judgment of foreclosure.

II. STANDARD OF REVIEW

On appeal, a court’s decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id.* A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). Summary disposition is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

III. PRIORITY OF LIEN

MCL 570.1119(3), provides:

A construction lien arising under this act shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.

MCL 570.1119(4) provides that, “[a] mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act. . . .”

This Court, in *M D Marinich, Inc v Michigan Nat’l Bank*, 193 Mich App 447; 484 NW2d 738 (1992), interpreted MCL 570.1119(3) and (4), and concluded that the plaintiff contractor’s construction lien on a building project related back to the first actual physical improvements made on the project by an earlier contractor. Appellant “acknowledges the general premise that all construction liens relate back to the first actual physical improvement and may, therefore, have priority over subsequent interests, including mortgages.”

Appellant argues however, that pursuant to above quoted portion of MCL 570.1119(4), that “the relation back principle only applies where the later liens arise from work performed on the same project as that in which the ‘the first actual physical improvement’ was made.” We disagree. The language of MCL 570.1119(4) does not support appellant’s claim. MCL 570.1119(4) does not mention the term, “project,” nor does it in any manner indicate that a construction lien can only attach to the “project” to which the improvements related.¹ Rather, MCL 570.1119(3) expressly provides that “[a] construction lien arising under this act shall take priority over *all* other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected. . . .” [Emphasis added.] Here, there is no dispute that appellant recorded its mortgages after Bush & Sons had begun the first actual physical improvement to property that the mortgages secured. Accordingly, there is no dispute that the construction liens

¹ Appellant’s reliance on *E.T. Mackenzie Company v Long Investment Company, Ltd*, unpublished opinion of the Court of Appeals, issued June 26, 2007 (Docket No. 265811), is wholly misplaced. In *E.T. Mackenzie Company*, a construction project was planned to encompass 27-parcels of land but contractors only performed work on some of the parcels before filing constructions liens. The key difference is that there were apparently separate mortgages for each of the 27 parcels, and thus a construction lien on particular parcel would not extend to all 27 parcels. Thus, *E.T. Mackenzie Company* is distinguishable.

have priority over appellant's mortgages, and the circuit court properly granted summary disposition to Komisar, Trucking Specialists, Michigan Pipe and Stoneco.

We affirm.

/s/ Elizabeth L. Gleicher

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly