STATE OF MICHIGAN

COURT OF APPEALS

FIRST COMMUNITY BANK,

Plaintiff/Counter-Defendant-Appellant,

v

MOUNTAINAIRE, L.L.C., CHEBOYGAN YACHT CLUB AT PIER 33, L.L.C., and KEITH BAZAIRE,

Defendants/Cross-Defendants,

and

CONSTANCE BAZAIRE, MISSION BAY CORPORATION, CONSOLIDATED ELECTRICAL CONTRACTORS, INC., LARRY MERCER, CHERYL MERCER, and PIER 33 WATER WORKS, L.L.C.,

Defendants,

and

DAVID M. SALEWSKE and GOURMET, INC.,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs,

and

PIONEER GENERAL CONTRACTORS, INC.,

Defendant/Counter-Plaintiff/Cross-Plaintiff-Appellee.

UNPUBLISHED
October 21, 2010

No. 293005
Cheboygan Circuit Court
LC No. 07-007763-CH

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this action arising from the failure of a multi-parcel mixed-use development project, plaintiff First Community Bank appeals as of right the trial court's order granting summary disposition in favor of defendant Pioneer General Contractors, Inc. under MCR 2.116(C)(10). Because we conclude that the trial court correctly determined that there was no question of material fact that Pioneer's construction lien had priority over First Community's mortgage, we affirm.

This Court reviews de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented by the parties and, viewing the evidence and all reasonable inferences in a light most favorable to the nonmoving party, determine whether a genuine issue of material fact exists for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the party opposing the motion fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

This case involves the interpretation of the Construction Lien Act (the Lien Act), MCL 570.1101 *et seq*. This Court also reviews de novo questions of statutory interpretation. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). "The cardinal rule of statutory construction is to give effect to the Legislature's intent." *M D Marinich, Inc v Mich Nat'l Bank*, 193 Mich App 447, 452; 484 NW2d 738 (1992). With respect to the Lien Act, "[i]n order to ascertain and give effect to legislative intent, the changes in the act must be construed in light of preceding statutes and the historical legal development of mechanics' or construction liens."*Id*.

First Community principally argues that under the Lien Act, Pioneer's well house and site work liens were untimely, and that its mortgage has priority over Pioneer's lien for the restaurant work. We do not agree that the liens were untimely.

The Lien Act is a remedial statue that must be liberally construed and provides that a lien is sufficiently valid if the person obtaining the lien substantially complies with the provisions of the Lien Act. MCL 570.1302(1). The Lien Act is intended to protect the right of lien claimants to payment for wages or materials when others have been provided with constructive notice (by the fact of visible construction) that there may be outstanding liens against the property. *M D Marinich*, 193 Mich App at 452-453. The act is also intended to protect owners from paying twice for construction services. *Id*. at 453.

A contractor who provides an improvement to real property has a lien on the entire interest of the owner or lessee who contracted for the improvement to the real property as well as certain other persons. MCL 570.1107(1), (2). Further, the forfeiture, surrender, or termination of any title or interest held by that owner does not defeat the lien. MCL 570.1107(3).

Construction liens have priority over interests that are recorded "subsequent to the first actual physical improvement." MCL 570.1119(3). However, 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." MCL 570.1119(4). An "actual physical improvement" is "the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement." MCL 570.1103(1).

Under MCL 570.1110(1), a contractor's demand for payment must be accompanied by a sworn statement. Under MCL 570.1110(9) and (10), providing a sworn statement is a prerequisite to enforcing a construction lien. When a demand for payment is unmet, a claim of lien must be timely asserted as provided by MCL 570.1111(1):

> Notwithstanding section 109, the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act *shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material* for the improvement, pursuant to the lien claimant's contract, a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located. [Emphasis added.]

This 90-day requirement is not subject to the "substantial compliance" provision of § 302. *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc*, 461 Mich 316, 320-324; 603 NW2d 257 (1999). Once a claim of lien is timely filed, it may be enforced by a foreclosure action as provided in MCL 570.1117 and MCL 570.1121.

In this case, the trial court did not err in finding that Pioneer's liens were timely recorded. First Community argues that both the well house lien and the site work lien were untimely because they were filed more than 90 days after the completion of the well house and the site work, respectively. But in *M D Marinich*, 193 Mich App at 456-458, this Court rejected the notion that priority is to be ascertained by reference to different contracts that a contractor may have undertaken during the course of a single project. The Court noted that under the preceding statute, "the type of work performed that was subject to a construction lien did not depend on whether a lien claimant entered into separate contracts, as long as the work related to the same building project." *Id*. at 457. A contract is "a contract, of whatever nature, for the providing of improvements to real property, including any and all additions to, deletions from, and amendments to the contract." MCL 570.1103(4). As this Court observed in *M D Marinich*, 193 Mich App at 457, "[n]othing in the act indicates that there is any intent to limit the number of contracts a laborer or other claimant can enter into and be given priority under the act."

MCL 570.1111(1) requires that a claim of lien be filed "within 90 days after the lien claimant's last furnishing of labor or material for the improvement, pursuant to the lien claimant's contract." First Community's argument would essentially mean that a contractor performing work on a single project, but under various contracts, would need to file a lien within 90 days after each contract is completed. Such an interpretation is contrary to the act's remedial purpose. As further discussed below, Pier 33 was a single project, despite the asserted change in ownership. First Community failed to provide any evidence to dispute the overwhelming evidence submitted by Pioneer that all of the work performed by Pioneer related to that single

project. There was no need for Pioneer to file a claim of lien after every contract was completed. It is undisputed that Pioneer filed its three claims of lien within 90 days after last furnishing labor or materials for the project. Therefore, the well house and site work liens were timely.

First Community argues that the work performed for the Yacht Club by Pioneer involved a separate project and did not relate to the 2004 notice of commencement filed by Mountainaire before Pioneer was hired. Therefore, First Community argues, the trial court erred in concluding that Pioneer's lien had priority over its mortgage under MCL 570.1119.

Pioneer submitted evidence that "actual physical improvements" to the property began in April and May of 2004. First Community offered no contrary evidence and conceded the issue for the sake of argument. However, Mountainaire did not file a notice of commencement until June 30, 2004, when it concurrently recorded First Community's mortgage. Mountainaire transferred ownership of the property to the Yacht Club on August 30, 2005. Thereafter, First Community continued funding the project and did not exercise its option to demand payment of the mortgage loan. Pioneer was then hired as general contractor and recorded a notice of commencement on September 19, 2005.

Under MCL 570.1119(3), "a construction lien takes effect upon the first actual physical improvement and has priority over a mortgage interest recorded after the commencement of the construction work." *M D Marinich*, 193 Mich App at 454. In the *M D Marinich* case, this Court rejected the bank's argument that the plaintiff's lien only related back to the date of the first physical improvement *under the particular plaintiff's contract*. *Id*. at 454-455. The Court found no evidence that the Legislature intended to change the traditional rule that liens relate to the commencement of construction "'regardless of the time when, or the person by whom the particular work was done or the materials furnished for which a lien is claimed.'" *Id*. at 452, quoting *Kay v Towsley*, 113 Mich 281, 283; 71 NW 490 (1897). The interpretation urged by First Community "is clearly not indicated from either the plain meaning of the act or the available legislative history." *Id*. at 455.

The Court recognized "that the Legislature's remedial efforts in the Construction Lien Act were also directed toward protecting mortgagees from unknown lien claimants." *Id*. The Legislature had considered that "[l]enders who have financed major construction projects in return for mortgages often discover too late that they have loaned money on titles clouded by the emergence of unrecorded mechanics liens." *Id*. (citation omitted). Accordingly, "the remedial changes made to the act were limited to the priority given mortgage lenders under [§ 119(4)], rather than the priority given to construction lienholders found at [§ 119(3)]." *Id*. at 456. Further, it was clear under the facts of that case that construction had already begun by the time the defendant recorded its mortgage, "thereby making priority under [§ 119(4)] unavailable to [the] defendant [bank]." *Id*.

We believe that the statutory language does not support First Community's argument that a new project (with new priorities) began when Pioneer filed a second notice of commencement in 2005. Rather, under MCL 570.1119(3) and (4), priority depends on when the mortgage was recorded with respect to the "first actual physical improvement." MCL 570.1103(1) defines an "actual physical improvement" as "the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer *which*

is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement." (Emphasis added.) A notice of commencement is not mentioned.

MCL 570.1302(1) of the Lien Act specifically provides that "[s]ubstantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them." Thus, aside from extending the time allowed for providing a notice of furnishing,[1] the Lien Act does not provide for any penalties for failing to immediately record a notice of commencement.

In this case, First Community presented no evidence refuting Pioneer's showing that construction on the Pier 33 project was visibly underway during April and May 2004, at least 30 to 60 days before First Community's mortgage was recorded. Therefore, the construction liens had priority over First Community's mortgage. Despite this, First Community argues that a new project began when Mountainaire transferred ownership to the Yacht Club, and Pioneer filed a new notice of commencement. Thus, First Community argues, its June 30, 2004, mortgage had priority over work performed by Pioneer.

MCL 570.1108(1) provides that "[i]f all improvements relate to a single project only 1 notice of commencement need be recorded." "A subsequent notice of commencement need not be recorded for an improvement to any real property which currently has a notice of commencement recorded in the office of the register of deeds *if that recorded notice of commencement contains the same information as the subsequent notice of commencement*." *Id*. (emphasis added). Thus, while § 108(1) states that a new notice of commencement need not be recorded, it does not prohibit the recording of a second notice of commencement for a single project. Further, § 108(1) seems to indicate that a new notice of commencement should be recorded when the stated information has changed.

In this case, it is undisputed that some of the information listed in the first notice changed in 2005. First, ownership was transferred from Mountainaire to the Yacht Club, and the Yacht Club had a different address and a different owner's designee. Additionally, Pioneer was hired as general contractor (where none was listed in the first notice).[2] Accordingly, the filing of a second notice of commencement was advisable to provide suppliers, subcontractors, and laborers with the information needed to file the notices, demands, sworn statements, and other documents necessary to protect their rights to payment under the act. See, e.g., MCL 570.1108; MCL 570.1109; MCL 570.1110.

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[1] Under MCL 570.1109, contractors must provide a notice of furnishing to the owner's designee and to the general contractor (if any) within a specified number of days after furnishing *the first labor or material* (unless they have contracted directly with the owner or lessee). Under MCL 570.1109(5) through (9), failure to timely provide the required notice of furnishing can defeat the right to a lien. But under MCL 570.1108(10) and (12), the failure to timely file a notice of commencement extends the deadlines for filing a notice of furnishing.

[2] While the property was described differently (by parcels in the first notice, and by metes and bounds in the second notice), it is undisputed that the parcel described is the same.

We disagree that the change of ownership signaled the commencement of a new project. MCL 570.1106(2) defines a "project" as "the aggregate of improvements contracted for by the contracting owner." In this case, First Community's loan credit summary states that Mountainaire "is the majority owner of Cheboygan Yacht Club at Pier 33 LLC." The Yacht Club "is a development company started to manage the residential and commercial development located at the Northwest intersection of The Cheboygan River and M-33 Hwy located in Inverness Township adjacent to the City of Cheboygan." Thus, First Community was familiar with the Yacht Club since the inception of the loan. Further, it was aware that Pier 33 entailed a development plan for the entire site, including commercial space, condominiums, a marina, and a restaurant and ship store.

On August 30, 2005, Mountainaire transferred the entire property to the Yacht Club for one dollar "and no other valuable consideration." While First Community states that the Yacht Club had no right to rely on the mortgage financing, it is undisputed that First Community continued to finance the project. Clearly, the transfer of ownership to the Yacht Club for one dollar was not an arm's length transaction intended to generate a profit. Further, the Yacht Club was created for the purpose of managing the development. The project was conceived as a whole and was presented to First Community as a whole, and First Community continued funding the project after the transfer of ownership. We conclude that there is no question of material fact that the Yacht Club assumed Mountainaire's role as the "contracting owner" and continued the same plan of improvements that was presented to and approved for financing by First Community.

Furthermore, MCL 570.1107(3) states that "[t]he forfeiture, surrender, or termination of any title or interest held by an owner or lessee who contracted for an improvement to the property, an owner who subordinated his or her interest to the mortgage for the improvement, or an owner who has required the improvement does not defeat the lien of the contractor, subcontractor, supplier, or laborer upon the improvement." Accordingly, a "lien is not *destroyed* when the entity with whom the lienholder contracted loses title to the relevant property." *Stocker v Tri-Mount/Bay Harbor Bldg Co*, 268 Mich App 194, 199; 706 NW2d 878 (2005) (emphasis in the original).[3] Thus, a change of ownership (with its attendant change of address and change of owner's designee) does not cut off priority where, as here, all of the improvements were part of a single multi-phase project. See *id*. at 199-200. Similarly, a change of general contractors does not signal the commencement of a new project or alter the priority of liens. *M D Marinich*, 193 Mich App at 455-456.

[3] This Court rejected the argument that, in the context of subsection (3) as a whole, the quoted sentence applies only to situations where the contracting entity lacks title (and the lien attaches to the improvement itself rather than to the land). *Stocker*, 268 Mich App at 200. The two provisions are properly grouped together because the first refers to an entity that has no title, whereas the second refers to an entity that loses title. *Id*.

Under MCL 570.1119(4), First Community could have taken steps to ensure its priority by obtaining sworn statements and waivers of lien from the contractors working on the project. It did not do so. The trial court correctly found that Pioneer's liens related to the original notice of commencement and had priority over First Community's mortgage.

First Community's remaining arguments are devoid of merit and require little discussion. We reject First Community's argument that the trial court erred by improperly weighing the evidence in granting summary disposition in favor of Pioneer. Rather, First Community failed to submit any evidence to contradict the affidavits and documentary evidence submitted by Pioneer.

First Community argues that even if Pioneer's liens have priority, there were questions of material fact concerning whether the restaurant work was performed pursuant to a valid contract, precluding summary disposition with respect to that lien. Generally, a contract need not be in writing unless it is subject to the statute of frauds. *Minkus v Sarge*, 348 Mich 415, 421; 83 NW2d 310 (1957). First Community does not argue that the statute of frauds is applicable to this case. Similarly, the Lien Act does not require a formal written contract for *commercial* projects such as this one. *Id*.; see also MCL 570.1103(4) (defining contract); c.f. MCL 570.1114 (providing that, to give rise to a lien, a residential construction contract must be in writing). In any event, First Community did not produce any evidence tending to show that a contract did not exist, or disputing the amount owed to Pioneer for the work it fully performed. The trial court properly found that no question of material fact existed for trial.

First Community also argues that factual and legal issues remained for trial concerning whether Pioneer may have contracted with a non-owner, such that under MCL 570.1107(3), Pioneer's lien attached only to that particular improvement. In addition to producing evidence of an agreement with the owner, Pioneer produced evidence that its contacts with the alleged lessee were simply an effort to get the restaurant sold and operating, after the Yacht Club failed to pay Pioneer. First Community again failed to offer any evidence to refute Pioneer's explanation.

Lastly, First Community argues that the trial court erred by refusing to limit Pioneer's lien to the restaurant parcel only, in the interest of equity. Actions to enforce construction liens are equitable in nature. MCL 570.1118(1). However, in this case, we fail to perceive any compelling equitable considerations requiring the trial court to exercise equitable powers to limit Pioneer's lien. The trial court did not err in enforcing the statute as written. *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 399; 662 NW2d 695 (2003).

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly