STATE OF MICHIGAN

COURT OF APPEALS

CITY OF PONTIAC,

Plaintiff-Appellant,

v

OTTAWA TOWER II, L.L.C., and CHARLES R. STEPHENS, as Trustee of NORTH BAY DRYWALL, INC., PROFIT SHARING PLAN & TRUST,

Defendants-Appellees,

and

DTE ELECTRIC COMPANY, f/k/a THE DETROIT EDISON COMPANY, DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET, and DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

UNPUBLISHED
March 15, 2016

No. 324548
Oakland Circuit Court
LC No. 2014-139761-CC

Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendants-appellees, Ottawa Tower II, L.L.C., and Charles R. Stevens, as Trustee of the North Bay Drywall, Inc., Profit Sharing Plan and Trust (hereinafter "defendants"), are owners of parcels of property, which adjoin the Phoenix Center in Pontiac. In 1980, plaintiff gave the owners of those parcels easement rights to the Phoenix Center. Plaintiff filed this action under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., to begin condemnation proceedings to acquire those rights and allow it to demolish a parking deck at the Phoenix Center. Defendants moved for summary disposition under MCR 2.116(C)(4) and argued that the trial court lacked subject-matter jurisdiction because plaintiff did not make an initial good-faith written offer to defendants, inasmuch as plaintiff's offer did not include the value of an additional lien interest in the parking deck that defendants had recorded. The trial court agreed and dismissed the action against defendants under MCR 2.116(C)(4). We affirm.

I. BACKGROUND

In 1979, plaintiff entered into an agreement to develop the subject property as part of a downtown development project. The project included the construction of a three-story parking deck, a pedestrian plaza on top of the deck to be used as an entertainment venue, and public site improvements. On May 8, 1980, plaintiff executed a declaration of easements, which was recorded. The declaration provided for certain non-exclusive reciprocal easements of ingress and egress in and through the parking deck, the plaza, and the parcels in the project area.

Although plaintiff owned the Phoenix Center, the parcels that border the parking structure and plaza were privately owned. The development plan included two office buildings that were to abut the parcel containing the parking structure. Defendants own those buildings and the parcels they sit on. The primary means for ingress and egress to the buildings is through the parking deck. In addition, the buildings' fiber optic networks run through the parking structure, and the drainage systems for the buildings and the parking structure are integrated with each other.

Due to plaintiff's financial difficulties, the governor appointed Louis Schimmel to act as its emergency manager. Schimmel concluded that plaintiff could not afford to continue to operate and maintain the Phoenix Center's parking structure. Because plaintiff was not maintaining the parking structure, defendants maintained the structure as necessary for their buildings' continued viability, spending more than one million dollars on maintenance. Defendant recorded a lien on plaintiff's property for the amount it spent for the maintenance work on the parking structure.

In a prior action filed in 2012, defendants obtained an injunction, which prohibited plaintiff and its agents from demolishing or diminishing the value of the parking garage. In August 2013, Schimmel directed the city administrator to issue good-faith offers to defendant, pursuant to MCL 213.55(1), for taking the easement rights under the declaration of easements, for the public purpose of demolishing the Phoenix Center parking structure in the interest of public health, safety, and welfare. In March 2014, plaintiff made written offers to defendants pursuant to MCL 213.55(1). Defendants did not accept plaintiff's offers, and plaintiff thereafter filed this action under the UCPA.

In response, defendants admitted that they had received offers from plaintiff which they did not accept, but denied that the offers were "good-faith" offers under the UCPA. Defendants thereafter moved for summary disposition under MCR 2.116(C)(4) and argued that plaintiff's written offer did not include the recorded lien in the amount of $1,001,147.63 for the work they performed pursuant to the declarations of easements, and therefore, the offer did not qualify as a good-faith offer under the UCPA, which acted to deprive the trial court of subject-matter jurisdiction.

Plaintiff did not challenge the lien itself but instead argued that it was not relevant because it was for the parking structure, not the easements for ingress and egress under the declaration of easements and, therefore, the lien did not affect the property interest that plaintiff sought to acquire. Relying on MCL 129.201, plaintiff also argued that defendants, as private parties, could not assert lien rights against public property. Plaintiff also argued that even if the

lien should have been included in its written offers, the remedy was to allow defendants to file claims for the lien in accordance with MCL 213.55(3)(a), not to dismiss the case for lack of subject-matter jurisdiction.

The trial court agreed with defendants that plaintiff's offers did not qualify as good-faith offers because they did not include all tangible and intangible property and property rights by omitting the lien. The court held that the declaration of easements entitled defendants to assert a lien for work performed pursuant to another owner's obligations. The court concluded that a lien interest is a property right and, therefore, qualifies as property under the UCPA. The trial court rejected plaintiff's argument that the lien did not affect the property it was seeking to condemn and reasoned:

> The Plaintiff's suggestion that the only property to be taken in these proceedings is the non-exclusive reciprocal easements of ingress and egress under the Declaration of Easements and that Ottawa Towers have no lien on these easements ignores the fact that in taking Ottawa Towers' easement to demolish the Deck to which the easements indisputably apply, the Plaintiff is destroying the property to which the lien applies. Michigan law has long recognized that disposing of property to which a lien applies disposes the lien itself. *Sleeper v Wilson*, 266 Mich 218, 222[; 253 NW 274] (1934) (holding that dissemination of property subject to a lien would "impair, if not wholly destroy," the lien). Thus, in taking Ottawa Towers' easement to demolish the Deck, the City is also taking Ottawa Towers' lien.

Accordingly, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(4).

II. SUBJECT-MATTER JURISDICTION

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(4) de novo. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). When reviewing a motion under this subrule, this Court "must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Manning v Amerman*, 229 Mich App 608, 610; 582 NW2d 539 (1998). This Court reviews both the pleadings and any other submitted evidence to determine whether the trial court had subject-matter jurisdiction. *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138-139; 796 NW2d 94 (2010).

Const 1963, art 10, § 2, provides that "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." "Just compensation is defined as the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred." *In re Acquisition of Land for the Cent Indus Park Project*, 127 Mich App 255, 261; 338 NW2d 204 (1983) ("*Cent Indus Park Project I*"). The purpose behind the UCPA is to ensure the state constitution's guarantee of just compensation. *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576; 711 NW2d 453 (2006). The UCPA provides

the standards for acquiring property for public use. *City of Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 632; 502 NW2d 638 (1993).

MCL 213.55 allows a public agency to file a condemnation action in circuit court if it has made a good-faith offer to the owner of the property interest sought to be acquired, and the owner declines the offer. The statute provides, in relevant part:

> *Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established*. . . . If there is more than 1 owner of a parcel, the agency may make a single, unitary good faith written offer. . . . The amount shall not be less than the agency's appraisal of just compensation for the property. If the owner fails to provide documents or information as required by subsection (2), the agency may base its good faith written offer on the information otherwise known to the agency whether or not the agency has sought a court order under subsection (2). The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property. *If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located*. . . . The complaint shall ask that the court ascertain and determine just compensation to be made for the acquisition of the described property. [MCL 213.55(1) (emphasis added).]

In *In re Acquisition of Land for the Cent Indus Park Project*, 177 Mich App 11, 14; 441 NW2d 27 (1989) ("*Cent Indus Park Project II*"), this Court addressed whether an agency's failure to make a good-faith offer before filing a complaint, as required by MCL 213.55(1), affects a circuit court's subject-matter jurisdiction to proceed with the agency's condemnation action. The Court considered the language in MCL 213.55(1), as well as prior Supreme Court decisions that addressed the same procedures in earlier condemnation cases, and concluded "that the tendering of a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action." *Id.* at 17.

Plaintiff argues that the rule from *Cent Indus Park Project II* no longer applies in light of amendments to MCL 213.55. We disagree. Since this Court decided *Cent Indus Park Project II* in 1989, there have been three amendments to MCL 213.55, implemented by (1) 1993 PA 308, effective January 28, 1994; (2) 1996 PA 474, effective December 26, 1996; and (3) 2006 PA 439, effective December 23, 2006. Plaintiff contends that a good-faith written offer is no longer a prerequisite for invoking the circuit court's subject-matter jurisdiction because current MCL 213.55(3)(a) establishes a procedure for an owner to file a claim for property not included in an agency's written offer. Specifically, subsection (3)(a) provides:

> (3) In determining just compensation, all of the following apply:

> (a) If an owner claims that the agency is taking property other than the property described in the good faith written offer or claims a right to compensation for damage caused by the taking, apart from the value of the property taken, and not described in the good faith written offer, the owner shall file a written claim with the agency stating the nature and substance of that property or damage. The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and to determine its value. The owner shall file the claim within 90 days after the good faith written offer is made pursuant to section 5(1) or 180 days after the complaint is served, whichever is later, unless a later date is set by the court for reasonable cause. If the appraisal or written estimate of value is provided within the established period for filing written claims, the owner's appraisal or written estimate of value may serve as the written claim under this act. If the owner fails to timely file the written claim under this subsection, the claim is barred.

Initially, we note that plaintiff incorrectly asserts that this Court has not recently applied the rule from *Cent Indus Park Project II*, which provides that failure to submit a good-faith written offer under MCL 213.55(1) is a jurisdictional defect. This Court has applied the holding in *Cent Indus Park Project II* in two published cases decided after the statute was amended in 1996 to add the claims procedure in subsection (3). See *Lenawee Co v Wagley*, 301 Mich App 134, 160; 836 NW2d 193 (2013); *Frankenlust Lutheran Congregation*, 269 Mich App at 576-577.

In addition, nothing in the amendments of MCL 213.55 indicate that the Legislature intended for the claims procedure to supersede this Court's holding in *Cent Indus Park Project II* regarding subject-matter-jurisdiction. The requirement of a good-faith written offer is intended to encourage negotiated purchases of property needed for a public purpose and, thereby, avoid condemnation litigation entirely. *Frankenlust Lutheran Congregation*, 269 Mich App at 577.

Accordingly, we hold that the rule from *Cent Indus Park Project II* remains viable and that a circuit court therefore lacks subject-matter jurisdiction in a condemnation action where the plaintiff fails to provide a good-faith written offer before filing the action.

We now turn our attention to whether the trial court properly determined that plaintiff's offer did not qualify as a good-faith offer. Plaintiff contends that in light of the claims procedure established under MCL 213.55(3)(a), its failure to include the value of the lien interest in its written offer did not preclude the offer from qualifying as a good-faith written offer. We disagree.

We conclude that the claims procedure in MCL 213.55(3)(a) is intended to apply to matters of which the condemning agency would not have reason to know before making its written offer because the subsection provides that the owner shall provide sufficient information to the agency to allow it to evaluate the validity and determine the value of the claim. This case involves a recorded lien interest, which is a matter of public record. Thus, plaintiff had at least constructive notice, if not actual notice, of the lien interest. The claims procedure in MCL 213.55(3)(a) does not supplant a condemning agency's obligation to first make a good-faith written offer that addresses all property interests of record. Because defendants' lien was a

matter of public record and qualifies as an interest in the subject property, plaintiff should have included the value of that lien in its written offer for it to qualify as a good-faith offer. See *Cent Ind Park Project I*, 127 Mich App at 261 (holding that offer that "did not include the value-in-place of movable fixtures or the detach-reattach costs for those fixtures" was not made in good faith). As a result, because plaintiff's offer did not qualify as a good-faith offer, the trial court lacked subject-matter jurisdiction, and the court did not err is dismissing the case on that ground.

III. VALIDITY OF DEFENDANTS' LIEN

Plaintiff argues that regardless of the validity of the rule from *Cent Indus Park Project II*, the trial court erred in ruling that defendants could properly record a lien against the publicly owned property. We disagree.

The trial court ruled that the lien was permitted under the following provision in the declaration of easements that plaintiff executed in 1980:

> 10. Right to Cure Default; Lien. If any Owner shall fail or omit to perform any of its obligations hereunder or shall fail to pay any tax, assessment or other charge imposed upon their respective Site or Improvements or perform any other act or discharge any other obligation in respect to such Site or Improvements which failure or omission may cause any provision of the easements, covenants and restrictions contained herein to be impaired, breached or nonperformed, the Owner of such Site or Improvements so in default shall perform the same within ten (10) days after receipt of written notice thereof given to such Owner by any other Owner and upon failure to so perform and remove such default within such ten (10) day period, then any other Owner shall have the right, but not the obligation, to cure such default, to pay any such default in the payment of money and/or to take such action (including, without limitation, re-entry upon the property of the defaulting Owner or Owners) as any other Owner may deem necessary or expedient to cure such default. Such other Owner or Owners, upon so performing, shall have a lien for the full and complete cost and expense of curing such default (including reasonable attorneys' fees) against the real property of the defaulting Owner(s), which lien may be foreclosed by suit in equity in the manner provided for the foreclosure of mortgages on real estate generally, or as may then be allowed at law. . . .

The trial court reasoned that because a lien is an interest in real estate, it is a property right. Therefore, defendants' lien qualified as "property" under MCL 213.51(i). The court rejected plaintiff's argument that it was only seeking to take the ingress and egress rights established by the declaration of easements. The court observed that plaintiff's taking was intended to demolish the parking structure, to which the lien applied. By taking and destroying the property to which the lien applied, plaintiff was also disposing of the lien.

MCL 213.51(i) defines "property" as "land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and *property rights* whether real, personal, or mixed, including fluid mineral and gas rights." (Emphasis added.) A lien is a security interest, which can apply to property, to secure payment. *Lawrence v Lawrence*, 150

Mich App 29, 33; 388 NW2d 291 (1986). "A lien upon land is an interest in or charge upon real estate . . . ." *Fredricks Lumber Co v Evans*, 266 Mich 486, 489; 254 NW 176 (1934). Accordingly, because a lien represents an interest or right in real property, it qualifies as a property right for purposes of a good-faith offer under the UCPA.

Plaintiff argues that paragraph 10 of the declaration of easements did not permit defendants to file a lien for work performed on the parking garage because plaintiff was never obligated to provide parking to defendants or any other owners and, thus, did not fail to perform any obligations under the agreement. We disagree. The declaration of easements clearly applies to the entire project, which includes both the plaza and the parking deck. The declaration of easements states that it was creating easements for not only pedestrian traffic, but also motor vehicle traffic to and from the parking deck:

> WHEREAS, Owners desire to create certain reciprocal easements for the benefit of the Initial Sites and the Initial Components *to provide for ingress and egress for pedestrian traffic between Initial Components and to and from any Initial Component and the Deck and/or any adjacent city streets, said easements to be over the Plaza and in and through the Deck*; to provide for reciprocal ingress and egress between the Initial Components; to provide for the use of certain walls of the aforesaid improvements either as party walls or for the attachment of one or more of such Initial Components to another; and to provide for the contingencies of subsequent development. [Emphasis added.]

The declaration of easements also contemplates that the owners would have access to both the plaza and the parking deck:

> 2. Plaza Access. Subject to the right of the Public Owner to charge reasonable usage fees by means of special assessments . . . , the Owners of the Project or any portion thereof and their respective agents, employees, customers and invitees, shall have the non-exclusive right to use the Plaza (excluding those areas to be occupied by the Retail Buildings to be constructed thereon) to be constructed pursuant to the Construction Contract and the sidewalks adjacent thereto and any other sidewalks located from time to time on the Plaza, for ingress and egress for pedestrian traffic and vehicles between the Improvements or any of them, and the adjacent public streets. The foregoing notwithstanding, the Public Owner shall have the right to prohibit the use of the Deck or Plaza by vehicles which, by reason of their weight or otherwise, could damage or in any manner lessen or impair the structural integrity of the Deck or Plaza or any other structures from time to time existing on any of the Parcels.

The agreement further contemplates the use of the parking deck by all owners because owners, both public and private, were charged with the duty of maintaining certain portions of the parking deck:

> 8. Maintenance. Each Owner shall cause the driveways and sidewalks contained within its respective portion of the Project and any landscape areas contained therein to be continuously repaired and maintained, including cleaning,

> lighting, painting, landscaping, removal of debris, removal of snow and ice, making of repairs to the driveways and sidewalks, and other similar maintenance, each at their own expense.

Reading the declaration of easements as a whole, it is apparent that other owners would be permitted to use the deck, as well as the walkways. The fact that the declaration of easements, or some other agreement, never gave defendants the right to park in the deck does not mean that plaintiff is not responsible for the work underlying defendants' lien because it did not expressly allow defendants to park in the structure.

Plaintiff also argues that any lien cannot be enforced against the property in question, which is public property. Plaintiff relies on MCL 129.201, which provides that a contractor that a governmental agency hires to perform certain work must first post a performance bond. MCL 129.201 was adopted "[b]ecause materialmen and contractors may not obtain a mechanics' lien on a public building . . . ." *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 181-182; 504 NW2d 635 (1993). As the trial court observed, MCL 129.201 was not intended to apply to a lien that results from a contract between an agency and a private party regarding real estate rights. Because the declaration of easements specifically gave defendants, as owners, the right to file the lien if they performed work on the project that another owner failed to perform, MCL 129.201 does not apply.

Plaintiff also argues that the trial court erred when it ruled that defendants had a right to file the lien without first conducting an evidentiary hearing. We again disagree. Although plaintiff criticizes the trial court for interpreting the declaration of easements without an evidentiary hearing, the proper interpretation of a contract is a question of law that a court reviews de novo. *Klapp v United Ins Group Agency*, *Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Moreover, when interpreting a contract, a court is required to determine the intent of the parties as expressed in the words used in the instrument. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Although a factual question may arise when a contract is ambiguous, *Klapp*, 468 Mich at 469, plaintiff does not argue that any provision in the declaration of easements is ambiguous. Accordingly, there was no need for an evidentiary hearing.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Joel P. Hoekstra