

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM J. LANG LAND CLEARING, INC.,

Plaintiff/Cross-Defendant-
Appellant,

v

GAETANO T. RIZZO, GTR BUILDERS, INC.,
and COMERICA BANK,

Defendants/Cross-Defendants,

and

JJ ASSOCIATES, INC.,

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

and

FIFTH THIRD BANK, d/b/a FIFTH THIRD
BANK EASTERN MICHIGAN,

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

and

GAETANO T. RIZZO LIVING TRUST and JAY
NICHOLAS FAMILY TRUST,

Third-Party Defendants.

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

UNPUBLISHED
February 14, 2012

No. 300402
Macomb Circuit Court
LC No. 2007-005493-CH

JJ Associates, Inc. (“JJ Associates”) and William J. Lang Land Clearing, Inc. (“Lang”) appeal an order for judgment and foreclosure of real estate following the trial court’s grant of summary disposition¹ in favor of Fifth Third Bank, d/b/a Fifth Third Bank Eastern Michigan (“Fifth Third”), and Comerica Bank.² We affirm.

JJ Associates argues that the trial court misinterpreted the meaning of an “actual physical improvement” when it concluded that the engineering planning and surveying services performed by JJ Associates did not constitute an “actual physical improvement” within the meaning of the Construction Lien Act (“CLA”).³ We disagree.

Fifth Third and Comerica Bank moved for summary disposition⁴ arguing that their mortgage interests had priority over JJ Associates and Lang’s construction liens.⁵ “We review de novo a trial court’s decision on a motion for summary disposition.”⁶ Summary disposition is proper when, in viewing the submitted affidavits, depositions, admissions or other documentary evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact.⁷ This case also involves questions of statutory interpretation, which are questions of law and will also be reviewed de novo.⁸ In interpreting a statute, this Court’s primary objective is to give effect to the intent of the Legislature.⁹ “This Court begins by reviewing the text of the statute at issue; if the language is unambiguous, it is presumed that the Legislature intended the meaning plainly expressed, and judicial construction of the statute is not permitted.”¹⁰

The purpose of the CLA is “to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs.”¹¹ While the CLA should be “liberally construed to effectuate these purposes,” this Court should not ignore “the

¹ MCR 2.116(C)(10).

² While both JJ Associates and Lang are appellants, only JJ Associates’ arguments are addressed on appeal. As such, any claims by Lang are abandoned. *DeGeorge v Warheit*, 276 Mich App 587, 600-601; 741 NW2d 384 (2007).

³ Construction Lien Act, MCL 570.1101 *et seq.*

⁴ MCR 2.116(C)(10).

⁵ Lang failed to respond to Fifth Third and Comerica’s motion for summary disposition so the trial court found that there was no question that they had priority over Lang’s construction liens.

⁶ *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

⁷ *Id.*

⁸ *Bates v Gilbert*, 479 Mich 451, 455; 736 NW2d 566 (2007).

⁹ *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

¹⁰ *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010).

¹¹ *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997).

act's clear and unambiguous requirements.”¹² The CLA sets forth the priority given to construction liens over other encumbrances in MCL 570.1119(3), which 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.

However, “a mortgage ‘recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act.’”¹³ An “actual physical improvement” is defined 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. Actual physical improvement does not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature. Actual physical improvement does not include supplies delivered to or stored at the real property.¹⁴

Thus, to constitute an “actual physical improvement,” the CLA “generally requires that visible, on-site construction work has begun on the property.”¹⁵ Accordingly, the acts excluded from the meaning of “actual physical improvement,” are “all of a nature that will not leave a permanent presence on the property.”¹⁶

Here, James Jones, President of JJ Associates, states in an affidavit filed in the lower court, that in January 2004, JJ Associates provided the following services:

boundary surveying, tree surveying, wetland surveying if necessary, topographical surveying, the preparation of engineering drawings for all site development, including earthmoving, the location and installation sanitary sewers and leads, storm drains, water mains and leads, interior streets and connections,

¹² *Id.*

¹³ *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 197; 706 NW2d 878 (2005), quoting MCL 570.1119(4).

¹⁴ MCL 570.1103(1).

¹⁵ *MD Marinich, Inc v Mich Nat Bank*, 193 Mich App 447, 454; 484 NW2d 738 (1992).

¹⁶ *Michigan Pipe & Valve-Lansing, Inc v Hebel Enterprises, Inc*, 292 Mich App 479; ____ NW2d ____ (Docket No. 294530, issued March 22, 2011) (slip op at 3).

and the preparation of preliminary plats and participation in plat approval, all staking and layout for construction, and other engineering services as needed for both Woodfield North and South.

Jones also indicated that from February 2004 to March 2004, field crews performed a topographical survey and completed a tree survey where “metal tags were nailed to all trees six inches in diameter and pink plastic ribbons were fastened around all surveyed trees.” Further, Jones stated that by April 1, 2004:

final boundary corners were installed for both developments. Metal pipes with a surveyor’s identification cap were installed in the ground at all property corners. Wooden laths with a pink plastic ribbons affixed to their shafts were placed at all property corners, for both projects.

We find that the language of MCL 570.1103(1) is clear and unambiguous that any labor associated with engineering planning and surveying, i.e., the work performed by JJ Associates such as conducting topographical or tree surveys, and placing survey indicators and markers on the property, is expressly excluded from the statutory definition of an “actual physical improvement.” While JJ Associates contends that the tree markers and other survey indicators would alert a person of an improvement because of their visibility, we find that they are not of the permanent nature that alerts a person that construction has begun.¹⁷ All of the actions taken by JJ Associates were related to its work of surveying the property. JJ Associates did not make a physical change or alteration that would alert a person upon reasonable inspection of an improvement.¹⁸ Although there are some actions taken during the preparation stages of construction that may constitute an “actual physical improvement,” these actions produce physical alterations or changes to the property.¹⁹

Further, although JJ Associates argues the definition of a “contractor” is ambiguous, we find that it reinforces the CLA’s clear distinction between engineering planning and surveying services and an “actual physical improvement.” MCL 570.1301 provides:

“Contractor” does not include a supplier, nor relate to a contract solely for preparation for the actual physical improvement such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature.

¹⁷ *MD Marinich, Inc*, 193 Mich App at 454.

¹⁸ MCL 570.1103(1).

¹⁹ This Court concluded that the digging of a 245-foot deep well during the “due diligence process,” constituted the “first actual physical improvement” since it made a readily visible physical change to the property. *Michigan Pipe & Valve-Lansing, Inc*, 292 Mich App 479, slip op at 2-4.

In light of the plain and unambiguous language of MCL 570.1103(1), we reject JJ Associates' argument that the services it provided constituted an "actual physical improvement." Accordingly, we conclude that the trial court did not misinterpret the CLA.

Next, JJ Associates argues that there is a question of fact regarding the date JJ Associates commenced its work on the properties at issue. JJ Associates failed to cite any legal authority regarding this issue. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."²⁰ Accordingly, the issue is abandoned.

Nevertheless, we will briefly address JJ Associates' argument. JJ Associates argues that since the trial court highlighted a discrepancy between the commencement dates alleged by JJ Associates that there is a question of fact to be resolved. Although the trial court highlighted a discrepancy between the date JJ Associates alleged it commenced work in a claim of lien and in a subsequent affidavit, we conclude that the trial court properly viewed the evidence in a light most favorable to JJ Associates and granted JJ Associates the benefit of the doubt that it commenced work on the Woodfield properties in January of 2004.²¹ The trial court incorporated the time frame Jones alleged in his affidavit in addressing the arguments for summary disposition and did not reject Jones's allegation that it commenced work earlier than recorded in JJ Associates' claim of lien. But, even while incorporating the date alleged by JJ Associates as the commencement date, the trial court concluded that, under the CLA, the alleged work performed during January of 2004 did not constitute an actual physical improvement. Thus, Fifth Third had a priority interest over JJ Associates' interest in relation to Woodfield North.

As discussed above, the trial court did not err in finding that Fifth Third had a priority interest. As such, we conclude that since the trial court implicitly resolved any doubt regarding the work commencement date in JJ Associates' favor, there is no material factual dispute.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly

²⁰ *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

²¹ *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).