[Cite as *Argo Constr. Co., Inc. v. Kroger Ltd. Partnership I,* 2009-Ohio-2811.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

ARGO CONSTRUCTION COMPANY, INC.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2008-09-036
	:	O P I N I O N
- vs -	:	6/15/2009
KROGER LIMITED PARTNERSHIP I, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVE 2007-0417

William M. Gustavson, 778 Old State Route 74, Cincinnati, Ohio 45245, for plaintiff-appellant

Roetzel & Andress, LPA, Todd A. Harpst, Aaron M. Walker, 222 South Main Street, Akron, Ohio 44308, for defendants-appellees, Kroger Limited Partnership I and F.H. Martin Construction Co.

BRESSLER, P.J.

{¶1} Plaintiff-appellant, Argo Construction Co., Inc., appeals the decision of the Clinton County Court of Common Pleas granting summary judgment in favor of defendants-appellees, F.H. Martin Construction Co. and Kroger Limited Partnership I.

{¶2} In 2006, Kroger contracted with Martin to construct a Kroger store in Blanchester, and Kroger filed a Notice of Commencement in April 2006. Martin utilized Tower Construction, LLC as a subcontractor to perform excavation work on the project.

To meet its obligation, Tower leased equipment from Argo. Argo issued a Notice of Furnishing to Kroger and Martin in September 2006. Additionally, Kroger and an adjacent landowner, Villar Farm Properties, entered into an agreement to allow Kroger to deposit and remove earth on Villar's lot during construction.

{¶3} From July through December 2006, Tower moved several thousand cubic yards of earth from Kroger's property to Villar's property as required under the subcontract. However, in December 2006, Martin suspended work on the project due to winter weather and poor site conditions with the intent to resume work in spring 2007. Tower's last work specifically authorized by Martin occurred on December 28, 2006. When the equipment lease agreement between Tower and Argo expired on December 31, 2006, Tower defaulted by failing to pay Argo.

{¶4} From January 20 through 31, 2007, and on February 4 and 5, 2007, Tower Project Superintendent Brady Grooms performed work with Argo's equipment at the project site.

{¶5} In early March 2007, Argo removed its equipment from the project site. On April 5, Argo recorded an Affidavit for Mechanic's Lien against the project for $96,440, which is the amount Argo alleges Tower owes pursuant to their equipment lease agreement. In that affidavit, Argo alleges the last date its equipment was used at the project site was March 1, 2007. In June 2007, Argo filed an action for foreclosure of the lien.

{¶6} In February 2008, Martin and Kroger moved for summary judgment, arguing that Argo has not perfected its mechanic's lien because it failed to file its affidavit within 75 days of authorized work being completed on the project using Argo's equipment. Argo also moved for summary judgment, arguing the evidence supported judgment in its favor. In August 2008, the trial court granted Martin's and Kroger's

motions for summary judgment, and denied Argo's motion for summary judgment. Argo appeals that decision, raising two assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT ARGO CONSTRUCTION, CO., INC. IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF APPELLEES F.H. MARTIN CO. AND KROGER LTD. PARTNERSHIP I."

{¶9} In its assignment of error, Argo argues the record reveals a genuine issue of material fact as to the last date work was performed on the project. Argo claims Tower performed work on the site, using Argo's equipment, within 75 days prior to the filing of the lien affidavit. Argo maintains that it preserved its mechanic's lien rights by filing the affidavit within 75 days of its equipment being used on the project.

{¶10} This court conducts a de novo review of a trial court's decision on summary judgment. *Harold v. Nationwide Mut. Ins. Co.*, Warren App. No. CA2007-01-013, 2008-Ohio-347, ¶11, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. In applying the de novo standard, we review the trial court's decision independently and without deference to the trial court's determination. *White v. DePuy* (1998), 129 Ohio App.3d 472, 478.

{¶11} A court may grant summary judgment only when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Welco Indus., Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191. The party who moves for summary judgment has the burden of demonstrating that there is no genuine

issue of material fact regarding the essential elements of the claim of the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

{¶12} According to the Ohio Supreme Court, mechanic's lien statutes create rights in derogation of the common law and therefore should be strictly construed as to whether a lien has attached. *Crock Construction Co. v. Stanley Miller Construction Co.*, 66 Ohio St.3d 588, 592, 1993-Ohio-212. The procedure for perfecting a mechanic's lien by a contractor, subcontractor or material supplier against property of an owner for whom services have been provided is set forth in R.C. Chapter 1311. See *Conveyor Engineering Co., Inc. v. Foreman Industries, Inc.* (Apr. 13, 1984), Montgomery App. No. 8385.

{¶13} If a property owner has filed a Notice of Commencement pursuant to R.C. 1311.04, a subcontractor or material supplier must file a Notice of Furnishing pursuant to 1311.05 to preserve its mechanic's lien rights. To perfect the mechanic's lien, the subcontractor or material supplier must file an affidavit for a mechanic's lien pursuant to R.C. 1311.06 and 1311.07.

{¶14} Specifically, R.C. 1311.06(A) provides in relevant part:

{¶15} "Any person, or his agent, who wishes to avail himself of sections 1311.01 to 1311.22 of the Revised Code, shall make and file for record in the office of the county recorder in the counties in which the improved property is located, an affidavit showing the amount due over and above all legal setoffs, a description of the property to be charged with the lien, the name and address of the person to or for whom the labor or work was performed or material was furnished, the name of the owner, part owner, or lessee, if known, the name and address of the lien claimant, and the first and last dates that the lien claimant performed any labor or work or furnished any material to the improvement giving rise to his lien. * * *"

{¶16} R.C. 1311.05(B) provides: "The affidavit shall be filed within one of the following periods." Further, R.C. 1311.06(B)(3) provides, "[i]f the lien is one not described in division (B)(1) or (2) of this section, within seventy-five days from the date on which the last of the labor or work was performed or material was furnished by the person claiming the lien."

{¶17} According to the record, Kroger, the landowner, filed a Notice of Commencement, and Argo properly filed a Notice of Furnishing. At issue in this case is whether Argo perfected its lien by filing its affidavit for a mechanic's lien within 75 days of authorized work being completed on the project using Argo's equipment.

{¶18} In granting Martin's and Kroger's motions for summary judgment, the trial court found that Martin and Kroger are entitled to judgment as a matter of law because there is no genuine issue of material fact regarding the date Tower last performed authorized work on the project. The trial court further found that since the last date Tower was authorized to perform under the contract exceeded 75 days prior to the lien affidavit being filed, Argo has not perfected its lien rights.

{¶19} According to the subcontract agreement between Martin and Tower, "[t]he work is to be done at such time or times and in such manner in such quantities as directed by Martin." When the terms in a contract are unambiguous, courts will not effectively create a new contract by finding an intent not expressed in the clear language employed by the parties. *Adkins v. Bratcher*, Washington App. No. 07CA55, 2009-Ohio-42, ¶18, citing *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 638, 1992-Ohio-28.

{¶20} Further, according to William Standen, Martin's Project Superintendent, Martin was in charge of the work to be performed on the project and was in charge of the schedule to be followed by all subcontractors, including Tower. Standen stated that Martin did not instruct Tower to perform work on the project between December 28,

2006 until May 2007. Standen further stated that as of December 28, 2006, Tower had not finished the work it was obligated to perform. However, Standen reiterated that this work was only to be performed when Martin authorized it. Standen stated that nobody from Tower requested permission from Martin to perform authorized project work during February 2007 and any such request would have been denied as the entire project had been suspended until spring 2007.

{¶21} Brady Grooms, the Tower Project Superintendent, stated in his affidavit that he used Argo's equipment to perform work on the project between January 20 through 31, 2007. Later, Grooms stated in another affidavit that he performed additional work on Saturday and Sunday, February 4 and 5, 2007. Grooms stated he "did this on [his] own as Tower construction, in hope it would better our relationship with Martin and [Tower] would get paid for some of the extra work." Grooms further stated, "the grading [he] did with [Argo's] dozer was necessary to prevent further erosion. Had not this work been performed, serious mud would have washed over on finished areas and Martin would backcharge us to have it done."

{¶22} Robert Chambers, who performs routine maintenance on Argo's equipment, stated in his affidavit that he visited the project site in late February 2007 and observed that the area where Argo's equipment had been left was very unfinished. Chambers stated there were piles of dirt blocking the area necessary for removal of the equipment. Chambers stated that for over a week, he did work necessary for removal of the equipment. Chambers stated, "[a]lthough the work we did was not ordered by Kroger[,] it had to be done and was necessary for eventual grading of the area."

{¶23} John Argo, Equipment Manager for Argo, stated in his affidavit that he accompanied Chambers in late February 2007 and assisted Chambers in preparing the equipment for removal, and stated he moved, graded, and leveled piles of earth so the

equipment could be removed. John Argo also stated that he visited the site in 2007 and observed another subcontractor performing similar grading and leveling work. Further, Albert Argo, President and Owner of Argo, stated in his affidavit that the grading and leveling work had been done because it was necessary for removal of Argo equipment.

{¶24} After a de novo review of the record, we find that the trial court properly granted Martin's and Kroger's motions for summary judgment. There are no genuine issues of material fact to be litigated, Martin and Kroger are entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to Argo. See Civ.R. 56. The record indicates that work performed after December 28, 2006 was not authorized by Martin, and therefore was not in furtherance of the contract between the parties.

{¶25} The clear, unambiguous language of the contract states that Tower was only authorized to perform work "at such time or times and in such manner in such quantities as directed by Martin." There is nothing in the record to indicate Martin authorized Tower to even be present at the work site after December 28, 2006. In fact, the evidence indicates just the opposite—that Martin suspended the project on December 28, 2006 and did not attempt to have Tower resume work until spring 2007. At that time, Tower could not be reached and another subcontractor performed the work that Tower failed to complete.

{¶26} Argo argues in its reply brief that that there is a dispute as to whether the work performed after December 28, 2006 was authorized by Martin. Argo maintains that the affidavits of Grooms, Chambers, John Argo, and Albert Argo, as well as the contract, show that Tower had contractual authority to work at the job site in late January and February 2007. However, the statements made in these affidavits only further demonstrate that the work performed by Grooms, Chambers, and John Argo after

December 28, 2006 was not authorized. Grooms explicitly stated he worked without permission in an attempt to improve the relationship between Martin and Tower and in hopes that Tower would be compensated for the "extra work." The affidavits of Chambers and the Argos clearly indicate the work they performed was work necessary to remove Argo's equipment. The grading and leveling work performed after December 28, 2006 was not requested or authorized by Martin, and as Standen indicated and John Argo verified, this work had to be redone in spring 2007 after the winter weather subsided.

{¶27} Argo also presents an argument, for the first time on appeal, that Tower could not be an "independent contractor" if Martin controlled the means and manner of doing the excavation and grading work. However, as this court has previously stated, a party cannot raise new issues or legal theories for the first time on appeal, and the failure to raise an issue before the trial court results in waiver of that issue for appellate purposes. *Estate Planning Legal Services, P.C. v. Cox*, Butler App. Nos. CA2006-11-140, CA2006-12-141, 2008-Ohio-2258, ¶17.

{¶28} Argo's first assignment of error is overruled.

{¶29} Assignment of Error No. 2:

{¶30} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT ARGO CONSTRUCTION CO., INC. IN DENYING ARGO'S CIV.R. 60(B) MOTION."

{¶31} After the trial court granted Martin's and Kroger's motions for summary judgment, Argo filed a motion for relief from judgment on the basis of surprise, based on Civ.R. 60(B)(1), which the trial court denied. Argo argues the trial court erred in denying its motion, as the trial court relied heavily on an affidavit that had not been properly served on Argo and that Argo was surprised by the filing of this affidavit.

{¶32} Civ.R. 60(B)(1) provides in relevant part, "[o]n motion and upon such terms

as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect * * *." A motion for relief from judgment under Civ.R. 60(B) is within the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. *Fitzwater v. Woodruff*, Preble App. No. CA2006-01-001, 2006-Ohio-7040, ¶9. An abuse of discretion constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶33} In its new trial motion, Argo argued that Martin and Kroger filed a second affidavit of William Standen on July 15, 2008, but failed to serve that affidavit on Argo. Argo attached an affidavit of its counsel, John Hauck, who explained that he had not been served with this affidavit, and that this affidavit was essential to the trial court's decision to grant summary judgment to Martin and Kroger.

{¶34} In the trial court's decision denying Argo's motion for relief from judgment, the trial court stated the following:

{¶35} "The court did rely upon this affidavit in rendering its decision, but not solely on this affidavit. * * * The court accepts the representation that the affidavit was not received or reviewed by counsel for [Argo] prior to the oral hearing on [Argo's motion for relief from judgment]. However, this July 15, 2008 affidavit only reinforces and supports other Rule 56 evidence that was already part of the record. The February 12, 2008 affidavit of Mr. Standen included several representations that no authorized work was performed upon the project after December 28, 2006. The construction contract of Tower Construction with F.H. Martin which determined the rights and responsibilities of the parties was already part of the record."

{¶36} After reviewing the record, including the trial court's explanation above, we find that the trial court did not abuse its discretion in denying Argo's motion for relief from judgment.

{¶37} Argo's second assignment of error is overruled.

{¶38} Judgment affirmed.

POWELL and WALSH, JJ., concur.

Walsh, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.