RENDERED: JANUARY 27, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000517-MR

TRI-COUNTY WOOD PRESERVING, INC. APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 04-CI-00493

DONALD M. SPEAR AND
JOHN SCHEIDT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: Tri-County Wood Preserving, Inc. ("Tri-County"), appeals from a February 2, 2005, order of the Shelby Circuit Court dismissing its complaint to enforce a materialman's lien against property owned by Donald Spear and John Scheidt. We affirm.

In March 2003, Scheidt and Spear contracted with Patrick J. O'Connell to construct fences on Stonecroft Farm, property that they own in Shelby County. O'Connell agreed to

provide both labor and material for the project. On March 25, 2003, Scheidt and Spear paid O'Connell $25,000.00 as a down payment.

In April 2003, O'Connell advised Scheidt and Spear that he required an additional payment to cover the costs of material. They paid O'Connell an additional $12,500.00 by a check dated April 22, 2003. Invoices produced during discovery indicate that the appellant, Tri-County, delivered two loads of treated poplar planks directly to O'Connell in Taylorsville, Kentucky. The first was shipped on April 24, 2003, and the second on May 5, 2003.

Although O'Connell failed to complete the project to the satisfaction of Scheidt and Spear, he presented a final bill to them on August 12, 2003. Within a short time, he filed for bankruptcy protection. Ultimately, Scheidt and Spear paid other contractors to complete the project.

On September 3, 2003, Scheidt and Spear received written notice that Tri-County intended to assert a lien against Stonecroft Farm for the cost of materials that had been sold and delivered to O'Connell. On September 5, 2003, Tri-County filed its lien on the property.

On September 3, 2004, Tri-County filed an action to enforce the lien. Scheidt and Spear filed a motion to dismiss

the action pursuant to the provisions of CR[1] 12. The supporting memorandum to the motion to dismiss included as attachments Spear's affidavit, a copy of the construction contract, dated correspondence from O'Connell, several invoices, copies of several checks drawn on the farm account, and other documents. Scheidt and Spear argued that the lien was invalid since Tri-County had failed to give notice of its intent to claim the lien within the time mandated by the provisions of KRS[2] 376.010. They also contended that their payment to the general contractor for the costs of the material and their status as owners/occupiers of the property meant that the property was not subject to the purported lien. The trial court agreed, and by order entered February 2, 2005, it dismissed Tri-County's action to enforce its unperfected lien against Stonecroft Farm. This appeal followed.

Because of the evidentiary material submitted along with the motion to dismiss, we believe that the motion to dismiss should have been treated as a motion for summary judgment. Whisler v. Allen, 380 S.W.2d 70 (Ky. 1964). Summary judgment is proper only where there exist no material issues of fact and it is shown that the movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center,

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes.

Inc., 807 S.W.2d 476 (Ky. 1991). The facts relevant to this appeal are undisputed. Tri-County asserts that the circuit court erroneously concluded that it had failed to give timely notice of its intent to claim a lien against the property. Resolution of the appeal involves a question of law: namely, whether Tri-County properly perfected a lien under the provisions of the Kentucky's mechanics' and materialmen's liens statute.

KRS 376.010(4) provides, in part, as follows:

> No person who has not contracted directly with the owner or his authorized agent shall acquire a lien under this section on an owner-occupied single or double family dwelling, the appurtenances or additions thereto, or upon other improvements for agricultural or personal use to the real property or real property contiguous thereto and held by the same owner, upon which the owner-occupant's dwelling is located, unless he notifies in writing the owner of the property to be held liable or his authorized agent not more than seventy-five (75) days after the last item of material or labor is furnished, of the delivery of the material or performance of labor and of his intention to hold the property liable and the amount for which he will claim a lien. . . . Notwithstanding the foregoing provisions of this subsection, the lien provided for under this section shall not be applicable to the extent that an owner-occupant of a single or double family dwelling or owner of other property as described in this subsection has, prior to receipt of the notice provided for in this subsection, paid the contractor, subcontractor, architect, or authorized agent for work performed or material furnished prior to such payment.

The interpretation of a statute is a matter of law for the court, and a statute should be construed so as to effectuate the legislative intent. City of Worthington Hills v. Worthington Fire Protection District, 140 S.w.3d 584 (Ky.App. 2004). The mechanics' and materialmen's statutes are to be interpreted according to the common meaning or usage of their language. Bee Spring lumber Co. v. Pucossi, 943 S.W.2d 622 (Ky. 1997). We are persuaded that the trial court properly applied the relevant provisions of the statute.

KRS 376.010(4) requires that a material supplier notify an owner/occupier in writing of his intent to claim a lien within seventy-five (75) days of furnishing the last item of material. Tri-County reads the statute as permitting it to give notice of its intent to claim a lien within seventy-five days of the last day that O'Connell furnished labor at the jobsite. His final invoice was dated August 12, 2003, and the notice of the lien (filed September 3, 2003) would have been timely under such an interpretation. However, the plain and unambiguous language of the statute defines the controlling event as the date of **furnishing** the last of the **material** from which to calculate the seventy-five days. See Laferty v. Wickes Lumber Co., 708 S.W.2d 107 (Ky.App. 1986); Mingo Lime & Lumber Co. v. Stanley, 79 S.W.2d 4 (Ky. 1935); Wolflin-Luhring Lumber

Co. v. Mosely, 154 S.W. 22 (Ky. 1913). Tri-County filed its notice of intent to assert a lien on September 3, 2003, thus occurring **121** days after it last **furnished material** to O'Connell on May 5, 2003.

Kentucky law is clear that a mechanics' and materialmen's lien must be properly perfected in order to be enforceable. See Hub City Wholesale Electric, Inc. v. Mik-Beth Electrical Co., LTD., 621 S.W.2d 242 (Ky.App. 1981). A lien claim against a noncontracting owner has not been perfected unless written and timely notice has been provided. Tri-County did not provide timely notice of its intention to claim a lien. Consequently, the trial court did not err by dismissing the action to enforce the lien.

For the foregoing reasons, the judgment of the Shelby Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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