

STATE OF MICHIGAN
COURT OF APPEALS

E.T. MACKENZIE COMPANY,

Plaintiff-Appellant,

UNPUBLISHED
November 22, 2011

v

SUTTON PLACE-RAISIN TWP., L.L.C. and
UNITED BANK & TRUST,

No. 297864
Lenawee Circuit Court
LC No. 08-002968-CK

Defendants-Appellees.

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff, E.T. MacKenzie Co., appeals as of right an order that granted defendant, United Bank & Trust (“United Bank”), a first-mortgage lien and priority over plaintiff’s lien, except for an amount of \$43,229.31. We reverse and remand.

I. BASIC FACTS

This dispute involves real property located in Raisin Township (“the property”). The property consisted of two parcels, Sutton Place No. 1 and Sutton Place No. 2, which totaled 93 acres. Defendant, Sutton Place-Raisin Twp., LLC (“Sutton Place”) wished to purchase the property and develop it into a residential subdivision.

Before purchasing the property, Sutton Place had some well testing performed. Alcock Drilling received paperwork from the Lenawee County Health Department for a total of eight wells to be drilled based upon applications made by Sutton Place. Alcock Drilling performed the drilling and testing for the eight wells. The wells were located on eight different lots scattered amongst the 93 acres. When finished, each of the PVC pipes extended approximately five feet above the ground. The work was completed by the end of August 2006.

On September 29, 2006, Sutton Place granted a mortgage in favor of United Bank for an amount up to \$2,000,000.¹ On that same day, Sutton Place purchased the property for \$900,000, using proceeds from the United Bank mortgage.

On May 21, 2007, plaintiff and Sutton Place entered into an agreement, where plaintiff would provide certain services related to the development of the property. This work was to include items such as demolition and removal; clearing and grubbing; soil erosion control; grading; storm sewers; retention basin beds; and on-site road construction. Plaintiff began work on May 29, 2007, and concluded on November 20, 2007.

Sutton Place paid plaintiff \$854,951.39 for the work, but plaintiff claimed that it was still owed \$325,008.30. As a result, plaintiff recorded a claim of lien for \$325,008.30 on January 7, 2008, and in May 2008, plaintiff filed suit against Sutton Place. Plaintiff later moved for partial summary disposition with regard to the issue of priority between its lien and United Bank's mortgage. The trial court found that the mortgage was recorded before the first actual physical improvement because it determined that the Alcock test wells did not meet the statutory definition of an "actual physical improvement." As a result, the trial court found that the mortgage, for the most part,² had priority over plaintiff's construction lien.

II. ANALYSIS

Plaintiff argues that the trial court erred when it determined that the test wells that were installed by Alcock Drilling were not "actual physical improvements" to the property. We agree.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). This issue also involves questions of statutory interpretation, which are also reviewed de novo. *Bates v Gilbert*, 479 Mich 451, 455; 736 NW2d 566 (2007).

Plaintiff filed its claim of lien under the Construction Lien Act ("CLA"), MCL 570.1191 *et seq.* MCL 570.1119(3) describes the priority of construction liens under the act:

¹ The mortgage was a "future advance mortgage" and was later recorded on December 11, 2006.

² Because the trial court found that the mortgage was recorded before any first actual improvement, it utilized MCL 570.1119(4) and determined that United Bank's mortgage had priority except for \$43,229.31 because that was the amount of an advance that was not accompanied by a sworn statement and waiver.

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.

Thus, “[t]he date of the ‘first actual improvement’ is the date that construction liens attach to the property for determining priority among competing liens and encumbrances.” *Mich Pipe & Valve-Lansing, Inc v Hebel Enterprises, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294530, issued May 3, 2011), slip op, p 3. And “first actual improvement” is defined in MCL 570.1103(1) 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.

United Bank argues that, because the wells were installed for testing purposes only, the wells do not constitute a “first actual physical improvement.” This Court recently addressed this precise issue. In *Mich Pipe*, a contractor installed a test well in order to obtain a water sample from the aquifer below the subject property. *Mich Pipe*, ___ Mich App at ___, slip op at 2. Like the defendant in *Mich Pipe*, United Bank maintains that such a test well should fall under the statute’s “due diligence” exception to being an “actual physical improvement” because, by its very essence, the well was never intended to be used beyond this initial testing phase. The Court rejected this premise and explained,

As defined in MCL 570.1103(1), an “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.” We do not dispute that these acts may suggest that the definition in effect recognizes a “due diligence process” that involves the specific procedures stated in the definition of “actual physical improvement.” Nor does the plain language of the statute, which states “such as,” suggest that the list is exhaustive. However, none of the procedures stated in the definition equates to the digging of a well, or any other act, which makes a “readily visible” “physical change” to the property. To the contrary, the acts identified in the statute are all of a nature that none of them will leave a permanent presence on the property. Consequently, we find [the defendant’s] assertion that the exception encompasses all acts done in the “due diligence process” is not supported by the plain and unambiguous language of MCL 570.1103(1). [*Mich Pipe*, ___ Mich App at ___, slip op at 4 (internal citations omitted).]

As a result, because the test wells were “readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement,”³ the wells constituted the “first actual physical improvement,” and the trial court erred when it decided otherwise. And since United Bank’s mortgage was “recorded subsequent to the first actual physical improvement,” plaintiff’s construction lien is entitled to priority over the mortgage. MCL 570.1119(3).

United Bank also asserts that, regardless of the status of the test wells being “first actual physical improvements,” plaintiff cannot avail itself of the construction lien priority because its work was unrelated to the initial drilling. There are two shortcomings with this proposition though. First and foremost, the CLA does not specify that the projects must be “related.” Instead, the CLA merely establishes that a construction lien has priority so long as “the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.” MCL 570.1119(3). Accordingly, plaintiff adding a “relatedness” requirement to the statute is unavailing. Second, even if such a requirement existed, it is clear that the initial drilling and plaintiff’s subsequent work both are “related” since they both are improvements necessary for the construction of a residential subdivision.

Because we conclude that plaintiff’s construction lien has priority over United Bank’s mortgage, we need not consider plaintiff’s other arguments on appeal.

Reversed and remanded for proceedings consistent with this opinion. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

³ We note that the pipes in this case extended approximately five feet above the ground, while the pipes in *Mich Pipe* extended approximately one foot above the ground. *Mich Pipe*, ___ Mich App at ___, slip op at 2.