

2013 PA Super 120

B.N. EXCAVATING, INC.,

Appellant

v.

PBC HOLLOW-A, L.P. AND PBC HOLLOW-B, L.P.,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1704 EDA 2010

Appeal from the Order Entered of May 17, 2010
In the Court of Common Pleas of Montgomery County
Civil Division at No(s): 09-17229

BEFORE: STEVENS, P.J., BOWES, GANTMAN, PANELLA, SHOGAN, ALLEN,
LAZARUS, MUNDY, and WECHT, JJ.

DISSENTING OPINION BY MUNDY, J.:

FILED MAY 17, 2013

I respectfully dissent. In my view, the Majority deviates from the limited issue of whether the trial court properly sustained Appellees' preliminary objections in the nature of a demurrer where Appellant's complaint in action upon its mechanics' lien claim failed to include any allegation to establish a required element, the existence of a structure on the property. Therefore, based on the applicable standard and scope of review, I would affirm the trial court's order granting Appellees' preliminary objections.

Our standard of review is as follows.

A preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient. **Cardenas v. Schober**, 783 A.2d

317, 321 (Pa. Super. 2001) (*citing* Pa.R.C.P. 1028(a)(4)). **“Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.”** *Id.* at 321–22. (citation omitted). All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Id.* at 321.

In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven. **This Court will reverse the trial court’s decision regarding preliminary objections only where there has been an error of law or abuse of discretion.** When sustaining the trial court’s ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case i[s] free and clear of doubt.

Brosovic v. Nationwide Mutual Insurance Co., 841 A.2d 1071, 1073 (Pa. Super. 2004) (citation omitted).

Weiley v. Albert Einstein Med. Ctr., 51 A.3d 202, 208 (Pa. Super. 2012) (emphasis added), *quoting* ***Cooper v. Frankford Health Care Sys., Inc.***, 960 A.2d 134, 143-144 (Pa. Super. 2008) (citations omitted).

In deciding whether to grant Appellees’ preliminary objections in the nature of a demurrer, the trial court was required to determine whether

Appellant raised a cognizable mechanics' lien claim against the property owned by Appellees.¹ The trial court found, "it is undisputed that the

¹ Specifically, the law allows a contractor or subcontractor to file a lien against the owner's property to recover payment for labor and material costs associated with improvements made to the property. 49 Pa.C.S.A. § 1301. Pennsylvania's Mechanics' Lien Law specifies the following, in pertinent part.

§ 1301. Right to lien; amount

Every improvement and the estate or title of the owner in the property shall be subject to a lien, to be perfected as herein provided, for the payment of all debts due by the owner to the contractor or by the contractor to any of his subcontractors for labor or materials furnished **in the erection or construction, or the alteration or repair of the improvement**, provided that the amount of the claim, other than amounts determined by apportionment under section 306(b) of this act, shall exceed five hundred dollars (\$500).

Id. (emphasis added). "Erection, construction, alteration or repair" includes the following.

(a) Demolition, removal of improvements, excavation, grading, filling, paving and landscaping, when such work is incidental to the erection, construction, alteration or repair;

(b) Initial fitting up and equipping of the improvement with fixtures, machinery and equipment suitable to the purposes for which the erection, construction, alteration or repair was intended; and

(c) Furnishing, excavating for, laying, relaying, stringing and restringing rails, ties, pipes, poles and wires, whether on the property improved or upon

(Footnote Continued Next Page)

Property is still vacant and unimproved, and thus [Appellant] cannot maintain its mechanics' lien and the Preliminary Objections of [Appellee] were properly granted." Trial Court Opinion, 8/2/10, at 6. The Majority concludes the trial court erred because it "ignored the assertions Appellant actually leveled in both the mechanics' lien claim and the complaint in action upon the mechanics' lien claim ... [and] based its decision to dismiss the lien upon a single averment in Appellees' preliminary objections." Majority Opinion at 6-7. The Majority also asserts the trial court "overlooked the countervailing position contained in Appellant's response to the preliminary objections wherein it specifically denied Appellees' factual averment and stated, *inter alia*, '[Appellant's] work was in preparation for the erection of a structure.'" **Id.** at 7 n.3. Further, the Majority contends that the exhibits attached to Appellant's complaint and mechanics' lien claim raise "the reasonable inference ... that Appellant performed its excavation incidental to the proposed construction of the two-building project that Appellees failed to complete." **Id.** at 7. On this basis, the Majority concludes, "the certified record belies the trial court's factual determination that the status of the property was undisputed." **Id.** at 8. However, as noted, the mechanics' lien

(Footnote Continued) _____

other property, in order to supply services to the improvement.

49 P.S. § 1201(12). Additionally, the statute defines improvement as "includ[ing] any building, structure or other improvement of whatsoever kind or character erected or constructed on land[.]" **Id.** § 1201(1).

claim and complaint are devoid of any allegation that a structure exists on the property. Therefore, the conclusions reached by the Majority result from a misapplication of the appropriate standard and scope of review. Thus, I cannot agree and respectfully dissent.

Appellant's mechanics' lien claim included a sole paragraph describing the work performed on the subject property.

4. [Appellant] entered into a contract with Warihay to **provide labor and materials for excavation work**, including but not limited to, a silt fence, temporary riser, emergency spill way, topsoil stripping, cut and fill, concrete pipe, subgrading for building pad, storm water bed, rock ripping and other site work (the "Contract"). A true and correct copy of the Contract is attached hereto and incorporated as Exhibit "B."

Appellant's Mechanics' Lien Claim, 6/8/09, at 2, ¶ 4 (emphasis added). Further, Appellant's complaint reiterates the same averment and states that the "improvement and property subject to the lien is the Providence Business Park West, Phase 2, 571 and 575 Hollow Road, Phoenixville, Pennsylvania 19460[.]" Appellant's "Complaint in Action Upon Mechanic's [sic] Lien Claim," 8/10/09, at 4, ¶ 10. Significantly, there are no allegations in Appellant's mechanics lien claim or in its complaint that the work Appellant performed was on a structure. Additionally, Appellant attached a copy of its mechanics' lien claim, with its four exhibits, to his complaint. These exhibits consist of an online printout from Montgomery County's property records, a material and labor proposal from Appellant to Warihay

Enterprises, Inc., various invoices from Appellant to Warihay Enterprises, Inc.² and Appellant's formal notice of intention to file a Mechanics' Lien claim. None of these documents attached to Appellant's pleadings support an inference that the work was performed on a structure. Contrary to the Majority, I do not believe that the fact Appellant referenced "Providence Business Park, West Phase 2" in its complaint supports a "reasonable inference" that a structure exists upon which Appellant performed its work. Additionally, even if it were within our scope of review, Appellant's bald denial in his answer to Appellees' preliminary objections fails to specifically refute, with any factual support or documentary evidence, the allegation in Appellees' preliminary objections raising the instant demurrer.

Specifically, Appellees' preliminary objections stated the following.

13. There is no building or structure of any type on the Property.

Appellees' Preliminary Objections, 8/28/09, at 4-5, ¶ 13.

In response, Appellant answered as follows.

13. Denied. Upon information and belief, the work was performed in a business park complex where there are many office buildings. Further [Appellant]'s work was in preparation for the erection of a structure.

² These included invoices for a construction entrance, a skimmer, silt fencing, a temporary riser, an emergency spillway, concrete piping, labor to strip topsoil, cut and fill structures, subgrade building pads, an underground storm water bed and rip rock. Appellant's Mechanics' Lien Claim, 6/8/09, at Exhibit C.

Appellant's Answer to Appellees' Preliminary Objections, 9/18/09, at 3, ¶ 13.

As the trial court aptly concluded in its Rule 1925(a) opinion,

[Appellant] asserts that its excavating work was advance preparation related to the anticipated construction of a building. Nevertheless, the buildings that may have been intended to be constructed on these parcels were not commenced and have not been built to date.

Trial Court Opinion, 8/2/10, at 3-4.

As set forth above, in making its determination, the trial court was bound by the allegations set forth in the pleadings and the exhibits attached thereto. Appellant's mechanics' lien claim and complaint both fail to aver that a structure exists on the property at issue. Additionally, Appellant has failed to attach any documentation or other evidence of the existence of a structure.

The Majority determines that the trial court erred in granting Appellees' preliminary objections by relying on **Morehall Contracting Co., Inc. v. Brittany Estates Ltd.**, 578 A.2d 508 (Pa. Super. 1990). **See** Majority Opinion at 8-9. I deem **Morehall** distinguishable from the instant case. In **Morehall**, this Court reversed the trial court's order granting preliminary objections on the ground that the record was "unclear" as to whether a structure actually existed on the property. **Morehall, supra** at 511. Specifically, the appellant in **Morehall** pled that it "furnished labor and materials used in the erection and/or construction of an improvement,

namely, a housing development known as 'Brittany Estates.'" **Id.** at 510. This Court concluded it was plausible "that the language means what it literally states," and that the housing development exists, thus our Court could not "hold that appellant ... 'clearly and without a doubt' failed to allege sufficient facts to establish his right to relief." **Id.** at 510-511.

Instantly, such doubt does not exist. As previously stated above, nowhere in the pleadings does Appellant aver any structure was ever erected on the property on which it provided excavation and subgrading work. Even if such a structure had been erected, Appellant's failure to include any allegation of its existence in the pleadings was fatal. **See Weiley, supra.** Furthermore, failure to deny and plead with documentary evidence compounded the problem. Because Appellant in this case failed to plead facts or attach evidence supporting a reasonable inference that a structure existed on the subject premises, the trial court could not resolve Appellees' preliminary objections in Appellant's favor.³

Accordingly, I conclude that the trial court did not commit an error of law in determining that Appellant's mechanics' lien cannot attach to the

³ In light of my resolution of Appellant's first issue concerning our standard of review, I express no opinion on Appellant's second issue or the Majority's treatment of **Sampson-Miller**. However, I do agree with the Majority's assertion that **Bricklayers of W. Pa. Combined Funds, Inc. v. Scott's Dev. Co.**, 41 A.3d 16 (Pa. Super. 2012) (*en banc*), *appeal granted*, 58 A.3d 748 (Pa. 2012), does not apply to 49 P.S. § 1201(12)(a). **See** Majority Opinion at 3-4 n.1.

Appellees' property. As it is undisputed that the pleadings fail to allege that a building or structure was ever erected on the property, I see no need for the trial court to develop a factual record as the Majority suggests. **See** Majority Opinion at 10. Therefore, I would affirm the trial court's order sustaining Appellees' preliminary objections, striking Appellant's mechanics' lien claim, and dismissing Appellant's complaint with prejudice. Accordingly, I respectfully dissent.