2011 PA Super 120

B.N. EXCAVATING, INC.,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
PBC HOLLOW-A, L.P. AND PBC HOLLOW-B, L.P.,	:	
Appellees	:	No. 1704 EDA 2010

Appeal from the Order Entered May 17, 2010, in the Court of Common Pleas of Montgomery County, Civil Division, at No: 09-17229.

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

OPINION BY BOWES, J.: Filed: June 7, 2011

B.N. Excavating, Inc. ("Appellant") appeals the trial court order wherein the court sustained the preliminary objections in the nature of a demurrer filed by PBC Hollow-A, L.P. and PBC Hollow-B, L.P. ("Appellees"), struck Appellant's complaint for a mechanics' lien, and dismissed the mechanics' lien claim with prejudice. We reverse and remand.

The trial court succinctly summarized the relevant facts and procedural history as follows:

> [Appellant] filed a mechanics' lien claim on or about June 8, 2009 in the amount of $118,670.71 against property and improvements owned by [Appellees] and known as Providence Business Park, West, Phase II, and located at 571 and 575 Hollow Road, Phoenixville, PA, 19460 ("Property"). The Property is owned by [Appellees]. [Appellant] filed a Complaint in Action upon Mechanics' Lien on August 10, 2009. [Appellant's] Mechanics' Lien claim arises from work allegedly

> performed by [Appellant] as subcontractor at the property pursuant to a contract between [Appellant] and Warihay Enterprises, Inc., which served as [Appellees'] general contractor. [Appellant] claims that it 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 spillway, topsoil stripping, cut and fill, concrete pipe, sub-grading for building pad, storm water bed, rock ribbing and other site work." [Appellant] claims that it completed its work on the property on December 18, 2008, and filed its Mechanics' Lien claim within six (6) months of completion of the work. [Appellees] filed Preliminary Objections to the Complaint on the Mechanics' Lien on August 31, 2009. [Appellant] answered the Preliminary Objections on September 14, 2009. After memoranda of law were filed, oral argument on the Preliminary Objections was heard on May 14, 2010, after which [the trial court] sustained [Appellees'] Preliminary Objections.

Trial Court Opinion, 8/2/10, at 1-2 (internal citations omitted). Appellant filed a timely notice of appeal and complied with the trial court's order to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Appellant presents the following questions for our review:

> 1. Whether the trial court erred in sustaining [Appellees'] Preliminary Objections and striking Appellant['s] . . . Lien Claim based on disputed facts regarding whether the work was incidental to the erection of construction of an improvement, and without receiving evidence on the issue.
>
> 2. Whether the trial court erred in concluding that the work performed by [Appellant] was not incidental to the erection or construction of an improvement.

Appellant's brief at 4.

In sustaining Appellees' preliminary objections, the trial court concluded that our reasoning in ***Sampson-Miller Associated Companies v. Landmark Realty Co.***, 303 A.2d 43 (Pa.Super. 1973) served to bar Appellant's mechanics' lien for the excavation it performed incident to the planned construction because a structure apparently never was erected. In ***Sampson-Miller***, this Court held that the plain words of the Mechanics' Lien Law established that "no lien can attach to land for work unconnected to the construction of a building."[1] ***Id***. at 46. In reaching this conclusion, the ***Sampson-Miller*** Court first considered the statutory definition of erection, construction, alteration, or repair pursuant to 49 P.S. § 1201(12)(a), which included, *inter alia*, excavation "when such work is incidental to . . . erection, construction, alteration or repair." ***See*** 49 P.S. § 1201(12)(a).[2] Significantly, the Court then observed that the General Assembly intended to differentiate between situations where ground work is

[1] While this Court has cited ***Sampson-Miller*** for this basic principle, we have never engaged in a critical analysis of the ***Sampson-Miller*** Court's holding or applied the proposed rule of law to bar a mechanics' lien under facts similar to the case *sub judice*, wherein it is patently evident that the excavation was performed in preparation for construction.

[2] The pertinent definitions have remained unchanged since the 1963 enactment. Section 1201(12)(a) provides as follows:

> (12) "Erection, construction, alteration or repair" includes:
>
> (a) Demolition, removal of improvements, excavation, grading, filling, paving and landscaping, when such work is incidental to the erection, construction, alteration or repair[.]

49 P.S. § 1201(12)(a).

performed **incidental** to construction as opposed to when ground work is performed **independent** of construction. ***Sampson-Miller, supra*** at 45.

The genesis of the proposed requirement that a structure must exist in order for a mechanics' lien to protect preliminary site work stems from the ***Sampson-Miller*** Court's review of the mechanics' lien statutes that preceded our 1963 law, a past provision in the Pennsylvania Constitution of 1874 that prohibited the General Assembly from broadening the scope of lien rights beyond what existed when the constitution was adopted, and several cases that interpreted the earlier statutes.[3] ***Id***. at 43-44, 45. The Court found that the law protected preliminary site work that was "connected to, and an integral part of" construction. ***Id***. at 45. After compiling those cases, which addressed matters ranging from architect's liens to the erection of oil refineries, the ***Sampson-Miller*** Court noted, "In no case, however, has a lien been allowed for work on land alone where no building or permanent structure is erected." ***Id***. at 45-46. It then affirmed

[3] ***In Parkhill v. Hendricks***, 53 Pa.Super. 9, *1 (Pa.Super. 1912), this Court declared the 1901 Mechanic's Lien Law unconstitutional and unenforceable insofar as it authorized a lien for "grading and sodding lawns or planting and guarding shade trees" because that activity was not connected to construction of a building and because the right to such a lien did not exist prior to the adoption of the Constitution of 1874. Specifically, we explained,

> Such work surely cannot be said to come within the provisions of the act of 1836, which contemplates only work done or materials furnished for or about the erection or construction of buildings. The work for which claim is here made was not done nor was the material furnished for or about the construction of the building, nor can it be said to be necessary thereto, as the building might very well be complete without it.

Id. The relevant constitutional provision was repealed in 1963.

the trial court's holding that "no lien can attach to land for work **unconnected** to the construction of a building." ***Id***. at 46 (emphasis added). From these observations sprung the asserted requirement that a building or structure must exist for a mechanics' lien to attach to land improved by preliminary site work.

Appellant's first argument challenges the trial court's singular reliance upon Appellees' allegation that, "There is no building or structure of any type on the Property," in order to sustain the preliminary objection. ***See*** Appellees' Preliminary Objection at 4; Trial Court Opinion, 8/2/10, at 3. Appellant disputes the status of the property and contends that the trial court ignored reasonable inferences in the mechanic's lien claim and complaint that established that the work was performed incidental to the erection or construction of an improvement. Upon review of the pleadings in the certified record, we agree with Appellant that the trial court erred in sustaining the demurrer based upon the sole assertion leveled in Appellees' preliminary objections.

We reiterate our standard of review of an order sustaining a demurrer as follows:

> When reviewing the dismissal of a complaint based upon preliminary objections in the nature of a demurrer, we treat as true all well-pleaded material, factual averments and all inferences fairly deducible therefrom. Where the preliminary objections will result in the dismissal of the action, the objections may be sustained only in cases that

> are clear and free from doubt. To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objections. Moreover, we review the trial court's decision for an abuse of discretion or an error of law.

Ira G. Steffy & Son, Inc. v. Citizens Bank of Pennsylvania, 7 A.3d 278 (Pa.Super. 2010) (quoting ***Burgoyne v. Pinecrest Community Ass'n***, 924 A.2d 675, 679 (Pa.Super. 2007)). A demurrer should be sustained only when the complaint is clearly insufficient to establish the pleader's right to relief. ***Ellenbogen v. PNC Bank***, 731 A.2d 175, 181 (Pa.Super 1999).

Thus, in order to review Appellees' demurrer properly, the trial court was required to determine whether the law precluded recovery notwithstanding Appellant's well-pleaded factual averments and all reasonable inferences that could be drawn therefrom. However, as noted *supra*, the trial court ignored the assertions Appellant leveled in both the mechanics' lien claim and the complaint in action upon the mechanics' lien claim, and it based its decision to dismiss the lien upon a single averment in Appellees' preliminary objections. In accepting that averment as true, however, the trial court also 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." ***See***

Appellant's Answer to Preliminary Objections, 9/14/09, at 3. Moreover, it is clear from Appellant's pleadings and the attached documentation that the excavation was performed in accordance with Appellees' planned "Providence Business Park, West Phase 2," which can be reasonably inferred to be the two-building construction project that Appellees failed to complete. ***See*** Mechanics' Lien Claim, 6/8/09, Exhibit B.[4] Thus, as highlighted by Appellant's pleadings and its response to the preliminary objections, the certified record belies the trial court's factual determination that the status of the property was undisputed.[5] As this case is not clear and free from doubt, dismissal was not warranted. ***See Ira G. Steffy & Son, Inc., supra*** ("Any doubt should be resolved by a refusal to sustain the objections"). Mindful of our standard or review and in light of the trial court's obligation to view Appellant's factual averments and reasonable inferences as true, we cannot find that a sufficient record existed to sustain Appellees' demurrer and dismiss Appellant's claim.

---

[4] While the construction plans that Appellant presents as evidence of the incidental construction in this case are not included in the certified record, Appellees conceded the existence of the construction plans and their admission to the record during the oral argument on the preliminary objections. ***See*** Appellees' brief at 11.

[5] It also merits mentioning that while an inspection of the property might reveal that no structure has been erected, that reality has not been reduced to a fact that is contained in the certified record. Accordingly, it was improper for the trial court to accept it as true. ***See Styers v. Bedford Grange Mutual Insurance Co.***, 900 A.2d 895, 898 (Pa.Super. 2006) ("the nature of a demurrer is inconsistent with the use of judicial notice where the underlying facts may be in dispute and do not appear in the complaint").

In addition, we disagree with the trial court's application of the ***Sampson-Miller*** holding to the facts of this case. In contrast to the trial court, we do not interpret the ***Sampson-Miller*** Court's observations regarding the facts underlying the cases it reviewed or its application of the principle requiring the preliminary work to be connected with construction as creating a bright-line rule that a mechanics' lien can never attach to land absent an erected structure. Thus, we decline to equate the phrase "incidental to the erection [or] construction" with the requirement that a structure actually exist, particularly where, as here, excavation clearly was performed in preparation for planned construction.

It is important to note that the relevant facts in ***Sampson-Miller*** did not reveal whether the excavation performed therein was in preparation for construction or whether it was completely independent of construction. While the ***Sampson-Miller*** Court's *dicta* identifies a hypothetical situation where a claimant would be precluded from filing a lien under its interpretation of the statute if "for whatever reason" the building was not constructed, that analysis does not appear to be essential to the panel's holding due to the unclear factual scenario in that case.[6] Instead, the

[6] Contrary to the esteemed dissent's assertion, we did not mischaracterize the ***Sampson-Miller*** Court's hypothetical illustrations describing the perceived inequities of the Mechanics' lien law as *dicta*. Black's Law Dictionary defines *obiter dictum* as "A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." BLACK'S LAW DICTIONARY 1100 (7th ed. 1999). Herein, we properly classified the ***Sampson-Miller*** Court's hypothetical illustrations as *dicta* because they were

hypothetical was designed to highlight what the panel perceived as potential inequities with the lien law. ***See id***. at 46.

In ***Dollar Bank, FSB v. EM² Development Corp.***, 716 A.2d 671, 673 (Pa.Super. 1998), this Court revisited the issue concerning whether excavation and site preparation was incidental to construction pursuant to Section 1201(12)(a), and we tempered the perspective contained in ***Sampson-Miller***. In contrast to the bright-line rule that the trial court herein derived from the ***Sampson-Miller*** Court's holding, in ***Dollar Bank***, we held that when excavation and related site work is performed as part of a "continuous scheme to erect" a structure, the Mechanics' Lien Law would permit the lien to attach. ***Id***. at 673.[7] While ***Dollar Bank*** was decided on a full factual record, a luxury we do not enjoy in this case, our refinement therein of the ***Sampson-Miller*** Court's principles is instructive.

---

not essential to the court's decision and did not affect the outcome of the case. In fact, the court framed the pertinent illustrations only after it had explained its reasoning fully and pronounced its holding. As the illustrations are not decisional, they are not binding. ***Stellwagon v. Pyle***, 133 A.2d 819 (Pa. 1957) (language that goes beyond the issue to be decided is considered dictum).

Moreover, ***Sampson-Miller*** is to be read against the established facts of that case. ***See Oliver v. City of Pittsburgh***, 11 A.3d 960, 966 (Pa. 2011) ("various principles governing judicial review protect against [an untenable slippage in the law], including the axiom that the holding of a judicial decision is to be read against its facts"). As noted, it is unclear from the ***Sampson-Miller*** Court's recitation of the facts whether the preliminary site work performed therein was incidental to or independent of planned construction. While the dissent would employ a general reading of ***Sampson-Miller*** and dismiss the lack of factual clarity as irrelevant, we are compelled to confront this vital, distinguishing point because it affects the precise issue controlling the outcome of this case, *i.e.*, whether the statutory phrase "incidental to erection" requires that a structure actually be built when the work clearly was performed incident to planned construction.

[7] We repeated the "continuous scheme" principle in ***City Lighting Products Co. v. Carnegie Institute***, 816 A.2d 1196 (Pa.Super. 2003), albeit in a different context.

In ***Dollar Bank***, the Toscano Development Corporation purchased thirty undeveloped lots, excavated the land, and installed sewer lines and other infrastructure. ***Id***. at 671. EM^2 Development purchased one of the lots in order to build a house. Dollar Bank financed the purchase and construction, and it recorded the mortgage. ***Id***. at 672. During the construction, EM^2 Development entered into a contract with Allegheny Millwork to provide finishing materials. ***Id***. However, EM^2 Development failed to pay for the materials, and Allegheny Millwork filed a mechanics' lien. ***Id***. Thereafter, Dollar Bank foreclosed on the property and acquired the land at a sheriff's sale, which extinguished the mechanics' lien. ***Id***. at 672. Allegheny Millwork then moved to set aside the sheriff's sale, arguing that the mechanics' lien had priority over the bank's mortgage. The trial court rejected Allegheny Millwork's position. ***Id***.

On appeal, we confronted the issue of whether the mechanics' lien took effect when Toscano began its excavation, which would have preceded the mortgage, or on the date EM^2 Development began construction. In order to resolve this issue, we analyzed whether the site work Toscano performed prior to EM^2 Development's purchase qualified as erection or construction pursuant to Section 1201(12)(a). Upon review of the facts therein, we concluded that the excavation was not incidental to construction "as evidenced by the fact that the work was not performed as part of a

continuous scheme to construct a home." ***Id***. at 673. Significantly, we reasoned that when Toscano performed the excavation, it was not engaged in home building, but rather, it was selling the improved lots. ***Id***.

While the procedural posture of that case is not directly on point with the limited facts contained in the pleadings herein, the analysis we employed in ***Dollar Bank*** is applicable to the case *sub judice*. Assuming Appellant performed its excavation and related site improvements, including, *inter alia*, clearing a construction entrance and sub-grading two building pads, in preparation for construction on Appellees' property, it performed acts incidental to construction or erection pursuant to section 1201(12)(a). Thus, we are not persuaded that ***Sampson-Miller*** precludes Appellant from obtaining relief under the Mechanics' Lien Law.

Two decisions from the South Carolina Court of Appeals illustrate the key difference between circumstances where excavation and preliminary site work is performed incidental to construction and situations where the work is performed independent of construction. South Carolina's Mechanics' Lien Law extends to excavation and other "work of making the real estate suitable as a site for the building or structure." ***See*** S.C. Code Annotated § 29-5-10. In ***Clo-Car Trucking Co. v. Clifflure Estates of South Carolina, Inc.***, 320 S.E.2d 51 (S.C. App. 1984), the South Carolina Court of Appeals considered whether a mechanics' lien can exist if a structure for

which site work was performed never was erected. In answering this question negatively, the court found no indication that the clearing and grading was performed in connection with the construction of a building. ***Id***. at 52-53. Hence, citing, *inter alia*, ***Sampson-Miller***, ***supra***, the Court of Appeals held, "a mechanic's lien cannot attach to land or to an owner's interest in land where the work done is unconnected with and forms no integral part of the erection, alteration, or repair of either a building or a structure of some description." ***Id***. at 54.

Later, in ***A.V.A. Construction v. Santee Wando Construction***, 400 S.E.2d 498 (S.C. App. 1990), the Court of Appeals reversed the trial court's reliance upon ***Clo-Car Trucking Co.*** to dismiss a contractor's mechanics' lien because no building or structure had been erected on the property that it had cleared, graded, paved, and installed a drainage system. In distinguishing the relevant facts in that case from ***Clo-Car Trucking Co.***, the Court of Appeals noted that, unlike the excavation and site work performed in ***Clo-Car Trucking Co.***, it was clear from the record in ***A.V.A. Construction*** that the work was performed in anticipation of the planned construction of a residential subdivision. ***Id***. at 499-500. Thus, viewing the cases together, the South Carolina Court of Appeals applied the precise framework that applies to the case at bar. As noted *supra*, where, as here, the facts of the case indicate present or planned construction, the

Mechanics' Lien Law would apply. ***See also Green v. Reese***, 261 P.2d 596 (Okla. 1953) (labor performed in leveling and building up certain vacant lots for future construction of building is lienable).

In light of the nuances that exist within the statutory definition and the averments contained in the complaint, it does not appear with certainty that the law precludes Appellant's recovery. Accordingly, we reverse the trial court's order wherein it sustained Appellees' demurrer and dismissed Appellant's mechanics' lien with prejudice, and we remand for further proceedings.

Order reversed and remanded. Jurisdiction relinquished.

Judge Mundy files a Dissenting Opinion.

B.N. EXCAVATING, INC.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
PBC HOLLOW-A, L.P. AND	:	
PBC HOLLOW-B, L.P.,	:	
Appellees	:	No. 1704 EDA 2010

Appeal from the Order entered May 17, 2010
in the Court of Common Pleas of Montgomery County Civil Division
at No. 09-17229

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

DISSENTING OPINION BY MUNDY, J.:

I respectfully dissent. Although I am sympathetic to the policy considerations at issue in this case, I believe the Majority misinterprets the holdings of ***Sampson-Miller Assoc. Companies v. Landmark Realty Co.***, 303 A.2d 43 (Pa. Super. 1973) and ***Dollar Bank, FSB v. EM2 Development Corp.***, 716 A.2d 671, 674 (Pa. Super. 1998), *appeal denied*, 737 A.2d 742 (Pa. 1999). In doing so, the Majority reaches a decision that is contrary to the precedent established by this Court.

In ***Sampson-Miller***, ***supra***, this Court explained that earlier versions of the Mechanics' Lien Law "had indeed provided protection for those who did preliminary work[.]" ***Id.*** at 45. The Court noted, however, that the statute only protected preliminary work "if that work was connected to, and an integral part of, the erection, construction, alteration, or repair of [a building or permanent structure]" and that "[i]n no case, however, has a

lien been allowed for work on land alone where no building or permanent structure is erected." ***Id.*** at 45-46. Thus, according to the ***Sampson-Miller*** Court, the Mechanics' Lien Law requires that the work not only be connected to the construction of a permanent structure, but also that the permanent structure be, in fact, erected and not merely planned or contemplated. ***Id.*** Based upon this interpretation of the statute, the ***Sampson-Miller*** Court affirmed the ruling of the trial court "that no lien can attach to land for work unconnected to the construction of a building." ***Id.*** at 46. Important to the holding, the Court unequivocally stated in reciting the facts of the case that "[n]o buildings or other permanent structures were built on [the pertinent] parcels of land." ***Id.*** at 43. Moreover, in further clarifying its holding, the ***Sampson-Miller*** Court explained the following.

> The present scope of the lien would deny a lien to a mason who constructed the foundation for a building, if the building, for whatever reason, were not constructed. Likewise, **as here**, one who laid a network of streets on undeveloped land is given no security for this debt, while one who does the identical work on land where a house is being built enjoys the security of the lien.

Id. at 46 (emphasis added).

The Majority incorrectly dismisses critical portions of the reasoning in ***Sampson-Miller***, ***supra***, by categorizing the Court's inconvenient language as dicta. According to the ***Sampson-Miller*** Court's clear interpretation of the Mechanics' Lien Law, the statute does not allow a lien to attach to

property on which a permanent structure has not, in fact, been erected. The Majority justifies departing from this clear precept annunciated in ***Sampson-Miller*** by positing that this portion of the "analysis does not appear to be essential to the panel's holding due to the unclear factual scenario in that case."[1] Majority Opinion at 8. My review, however, reveals that the facts in ***Sampson-Miller*** were quite clear. "The work which furnished the basis of [the] asserted lien consisted of the following: clearing, grubbing, excavating and grading the land; installation of storm sewers, sanitary sewers, paving and curbing; and seeding." ***Sampson-Miller***, ***supra*** at 43. In addition, as I noted above, "[n]o buildings or other permanent structures were built on [the pertinent] parcels of land." ***Id.*** at 43.

While the ***Sampson-Miller*** Court makes no specific mention as to whether the work performed was in preparation for the construction of a permanent structure or whether the work was completed independent of any such structure, the Court's reasoning renders this type of inquiry irrelevant where no permanent structure has been erected on the pertinent property. Significantly, in holding that a permanent structure must be erected in order for a lien to attach to said property, the ***Sampson-Miller*** Court recognized the ramifications of its decision by noting that the effect of

[1] The Majority classifies the ***Sampson-Miller*** Court's discussion of a factual scenario where a building or permanent structure was not, in fact, erected as a "hypothetical situation[.]" Majority Opinion at 8. The facts of ***Sampson-Miller***, ***supra*** at 43, however, explicitly belie this notion, as this was the precise factual scenario confronted by the ***Sampson-Miller*** Court.

its interpretation of the Mechanics' Lien Law yields "anomalous if not inequitable results, particularly in light of the aims of such legislation to encourage construction and afford protection for laborers." ***Sampson-Miller***, ***supra*** at 46 (footnote omitted). Nonetheless, the ***Sampson-Miller*** Court felt constrained by this interpretation of the Mechanics' Lien Law because, as it noted, we "have generally reviewed [mechanics' lien] claims with a strict construction of the statute which created them." ***Id.*** at 43; ***see also Artsmith Development Group, Inc. v. Updegraff***, 868 A.2d 495, 496-497 (Pa. Super. 2005), *appeal denied*, 890 A.2d 1055 (Pa. 2005) (stating "the mechanics' lien law authorizes a special remedy in favor of a unique class of creditors and the liens are thus generally reviewed with a strict construction of the statute that created them").

Moreover, the Majority unduly expands the holding in ***Dollar Bank***, ***supra***, in order to further diminish the importance of our decision in ***Samspon-Miller***. In ***Dollar Bank***, ***supra***, following a bank foreclosure and a subsequent sheriff's sale, this Court was confronted with the issue of whether a mechanics' lien had priority over a mortgage lien. ***Id.*** at 672. Prior to the issuance of the mortgage, Toscano Development Corporation purchased thirty undeveloped lots with the intent of selling the lots to housing contractors who planned to develop the land for residential use. ***Id.*** at 671. "Toscano prepared the entire project for construction by installing sewer lines, placing fill, and building an end wall to contain water

flow and ensure stability of the soil." ***Id.*** EM^2 Development Corporation purchased one lot from Toscano and began construction of the house located on the lot, after securing a mortgage from Dollar Bank in order to finance the project. ***Id.*** During construction, EM^2 Development contracted with Allegheny Millwork to provide finishing materials. ***Id.*** Allegheny Millwork, however, filed a mechanics' lien when EM^2 Development failed to pay for the materials. Thereafter, Dollar Bank foreclosed on the property and acquired the land at a sheriff's sale. ***Id.*** at 672. Allegheny Millwork then filed a petition to set aside the sheriff's sale. ***Id.***

Once the petition to set aside the sheriff's sale was filed, the issue became whether the mechanics' lien had priority over the mortgage lien. ***Id.*** The ***Dollar Bank*** Court explained that the mechanics' lien would have priority if the lien attached when Toscano began excavating the property; conversely, the mortgage would have priority if the mechanics' lien only attached once EM^2 Development began construction of the house. ***Id.*** Thus, the ***Dollar Bank*** Court was confronted with determining whether a mechanics' lien may attach to property based upon excavation work completed **before** the construction of a permanent structure was planned, despite the fact a permanent structure was ultimately erected on the property. The ***Dollar Bank*** Court interpreted the Mechanics' Lien Law as requiring work, such as excavation, to be incidental to the "erection or construction" of an improvement in order for a lien to attach to property.

Id. at 673, *citing* 49 P.S. §§ 1508, 1201(12)(a). The Court stated that, for purposes of the Mechanics' Lien Law, improvement is defined as "a building or permanent structure." ***Id.*** at 674, *quoting* ***Sampson-Miller***, ***supra*** at 45-46. Then, the ***Dollar Bank*** Court determined that "the [excavation] work performed by Toscano was not 'incidental to the erection [or] construction' [of an improvement] as evidenced by the fact that the work was not performed as part of a continuous scheme to construct a home." ***Id.*** at 673. As such, the ***Dollar Bank*** Court held that the mechanics' lien did not attach when Toscano began excavating the property. ***Id.*** at 673-674.

As the above discussion indicates, ***Dollar Bank*** addressed a factual scenario in which preliminary site work was performed independent of the planned construction of any permanent structure. Consequently, such work was insufficient to form the basis of a mechanics' lien, even though a permanent structure was ultimately erected on the pertinent property. The Majority opines that "the analysis we employed in ***Dollar Bank*** is applicable to the case *sub judice*." Majority Opinion at 10. The Majority proceeds to extrapolate from the holding in ***Dollar Bank*** the principle that preliminary site work performed in preparation for the construction of a permanent structure is sufficient for the attachment of a mechanics' lien, regardless of whether a permanent structure, in fact, exists on the property at issue. ***Id.*** at 10-11. ***Dollar Bank*** does not address the issue of whether preliminary

site work "performed as part of a continuous scheme to construct a [permanent structure]" would be a sufficient basis for the attachment of a mechanics' lien, if no permanent structure was ever erected.[2] ***See Dollar Bank***, ***supra*** at 673. Consequently, I disagree with the Majority's use of the holding in ***Dollar Bank***. Because ***Dollar Bank*** is not directly on point to the facts of this case, I believe the Majority inappropriately utilizes that decision to avoid applying the clear precedent set forth in ***Sampson-Miller***.

Additionally, I believe the Majority erroneously suggests that the trial court should have denied Appellees' preliminary objections because it may be reasonably inferred from Appellant's factual averments that a permanent structure exists on the pertinent lot in the Providence Business Park. In its mechanics' lien claim and complaint, Appellant states that it performed the terms of the contract, providing "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[.]" Complaint, 8/9/10, at ¶ 3; Mechanics' Lien Claim, 6/9/08, at ¶ 4. From the averments made in both the mechanics' lien claim and the complaint, I acknowledge it may be reasonably inferred that the work performed by Appellant was done in preparation of a planned improvement, a permanent structure. ***See***

[2] Because the ***Dollar Bank*** Court determined that the preliminary site work in that case was not performed in preparation for the construction of a permanent structure, I do not believe that we should speculate as to what the Court's holding may have been if the facts in ***Dollar Bank*** were different.

Hess v. Fox Rothschild, LLP, 925 A.2d 798, 805-806 (Pa. Super. 2007), *appeal denied*, 945 A.2d 171 (Pa. 2008) (stating that, in resolving preliminary objections in the nature of a demurrer, "[a]ll material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true"). Nevertheless, Appellant does not allege that a permanent structure or building, in fact, exists currently on the property. Rather, Appellant merely avers that "[t]he improvement and property subject to the lien is the Providence Business Park West, Phase 2, 571 and 575 Hollow Road, Phoenixville, Pennsylvania 19460." Complaint, 8/9/10, at ¶ 10. In ***Dollar Bank***, we stated that excavation work, such as that described by Appellant in its pleadings, does not qualify alone as an improvement for purposes of the Mechanics' Lien Law. ***Dollar Bank***, ***supra*** at 673-674. Thus, I discern no averment made by Apellant that would allow us to infer the existence of a permanent structure on Providence Business Park West, Phase 2. ***See Hess***, ***supra*** at 805-806; ***see also*** Complaint, 8/9/10, at ¶ 10. From my review of the pleadings, the averment in paragraph ten of Appellant's complaint refers only to the real property upon which the mechanics' lien was intended to attach, not to the existence of any structure erected on said property. ***See id.***

The Majority explains that, in its answer to the preliminary objections, Appellant specifically denied Appellees' allegation that no permanent structure exists on the property and asserted "[Appellant's] work was in

preparation for the erection of a structure."[3] Majority Opinion at 7, *quoting* Appellant's Answer to Preliminary Objections, 9/14/09, at ¶ 13. This denial, however, is insufficient to cure the legal deficiencies in Appellant's mechanics' lien claim and complaint. As I reason, according to our precedent interpreting the statute, the Mechanics' Lien Law requires the claimant to aver that a permanent structure has been, in fact, erected on the pertinent lot. ***See Sampson-Miller***, ***supra*** at 45-46. Appellant merely reiterates its earlier averments, which infer that the work done was incidental to, rather than independent of, a planned permanent structure. Hence, I do not believe any further inference is warranted based upon Appellant's denial. ***See Hess***, ***supra*** at 805-806.

Therefore, based upon my interpretation of the pertinent case law, as well as my review of the factual averments made by Appellant, I conclude that the trial court properly sustained Appellees' preliminary objections. Accordingly, I respectfully dissent.

[3] In its denial, Appellant also avers that "[u]pon information and belief, the work was performed in a business park complex where there are many office buildings." Appellant's Answer to Preliminary Objections, 9/14/09, at ¶ 13. Whether there are many office buildings inside the business park complex as a whole is not, itself, relevant. The pertinent question is whether either "Building A" or "Building B", the two buildings for which the preliminary site work was performed in anticipation thereof, was erected in Providence Business Park, Phase 2, which is the specific lot referenced in Appellant's mechanics' lien claim and complaint. ***See*** Mechanics' Lien Claim, 6/8/09, at Exhibit B; Complaint, 8/9/10, at ¶ 10. Again, I do not believe that we may reasonably make such an inference based upon this statement.