

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**National City Bank,
Defendant Below, Petitioner**

vs) **No. 11-0437** (Monongalia County No. 08-C-219)

**Landau Building Company,
Plaintiff Below, Respondent**

and

**Laurita Excavating Inc.,
Defendant Below, Respondent**

FILED
October 21, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner National City Bank appeals the circuit court's entry of judgment for Respondents Landau Building Company ("Landau") and Laurita Excavating, Inc. ("Laurita") against petitioner's lende, Augusta Apartments, LLC ("Augusta"), following a bench trial in this mechanic's lien suit. The circuit court held that petitioner's deed of trust is junior in priority to the mechanic's liens of Landau and Laurita. Landau and Laurita have filed responses.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The dispute in this appeal arises from the construction of the Augusta Apartments, a student apartment complex in Morgantown, West Virginia. In October 2006, petitioner issued a commitment letter to Augusta, the owner of the project, agreeing to provide a construction loan in the amount of \$20,648,000 to finance the project. The Augusta Apartments project was part of a larger public-private partnership known as "The Square at Falling Run." The property on which the apartments were to be built was owned by McCoy 6 Apartments, LLC

(“McCoy”), a business owned and controlled by the same family members who had formed Augusta.

In November 2006, respondent Landau contracted with Augusta to serve as both the construction manager and general contractor of the project. Their contract had an arbitration clause. Respondent Laurita Excavating, a subcontractor, was hired to perform the excavation and site work on the project.

The circuit court concluded that Laurita had begun performing site preparation work prior to the December 13, 2006, Augusta’s closing on the property. The circuit court specifically found that “[n]o later than 12-11-06, Laurita was on the Augusta site with heavy equipment leveling, clearing trees and brush, and hauling out mud and rocks to clear the site for the apartment buildings.” The circuit court also found that “[a]ccording to Laurita’s and Augusta’s records, Laurita was performing subcontract services for Landau to benefit the private portion of the Augusta Project on December 11, 12, 13 and 14, 2006.” The circuit court also found that “Augusta admitted that one of its representatives advised [petitioner bank] prior to closing that Landau had begun work on the project prior to December 13, 2006.”

The closing on Augusta’s purchase of the property where the Augusta Apartments were to be built took place on December 13, 2006. The circuit court found that the closing was held at a location near the Augusta construction site and that petitioner’s representatives who were present at the closing “could have easily ascertained whether work had started on the Project . . . [however] representatives of [petitioner] did not view the construction site prior to or on the date of closing” Petitioner recorded its deed of trust on December 14, 2006.

The circuit court found that sometime after closing, Landau signed a “Consent of Contractor” document which included the representation that the contractor, all subcontractors and materialmen “have no right, lien or interest (including, without limitations, any right to file mechanic’s or materialmen’s liens) in and to any of the property” The circuit court found that this representation was false as site preparation work had begun prior to the closing.

The apartment complex was substantially completed and opened for occupancy by August 2007, around the start of West Virginia University’s 2007 Fall Semester. Laurita last worked on the project in October 2007. According to the petition, at some time late in the 2007 Fall semester, Landau contacted petitioner to indicate that it owed its subcontractors substantial sums of money and that Augusta owed Landau “millions of dollars.” Because Augusta was now insolvent, Landau asked petitioner to pay the additional money which petitioner refused.

In January of 2008, Landau finished working on the project and filed its Notice of Mechanic's Lien against Augusta in the amount of \$2,283,317.90. The circuit court found that Landau's mechanic's lien was timely filed as required by West Virginia Code § 38-2-7. Similarly, Laurita filed its Notice of Mechanic's Lien against Augusta in January of 2008, in the amount of \$383,284.27, and the circuit court found that its mechanic's lien was also timely filed.

Landau filed the mechanic's lien enforcement action against Augusta, petitioner, and Laurita. Augusta counterclaimed against Landau for breach of contract alleging construction defects and unauthorized payments. Laurita filed a counterclaim against Landau and a cross-claim against Augusta. Petitioner filed a cross-claim against Augusta and a third-party complaint against the owners of McCoy 6 Apartments, LLC, which sold Augusta the property on which the Augusta apartments were built. The circuit court stayed the action to allow Landau and Augusta to undergo arbitration, as required by their contract.

Landau and Augusta reached an agreement prior to an arbitration hearing and the arbitration panel issued a consent award based upon the agreement, which required Augusta to pay Landau \$2,000,000. Included within this sum was the amount of Laurita's mechanic's lien. According to the petition, had the arbitration hearing been held, Augusta's expert would have testified that Landau might be owed \$14,000, instead of the \$2,000,000 sought. In its response, Landau asserts that petitioner was aware of the arbitration and could have assumed the contract between Landau and Augusta and defended Augusta in the arbitration. However Landau contends that petitioner chose not to participate in the arbitration.

Following the arbitration, petitioner and Laurita filed motions for summary judgment and Landau moved for partial summary judgment. The circuit court denied the motions based upon its findings that there were genuine issues of material fact as "the parties to this action differ considerably in their view of what date the privately funded portion of the construction began, whose lien has priority, and whether certain liens are valid. Landau and Laurita each maintain that their mechanic's liens are valid and enforceable while [petitioner] maintains they are not. [Petitioner] argues that it holds a first lien on the Augusta property and that Landau and Laurita freely entered into lien waivers, making their mechanic's liens null and void. [Petitioner] further contends that its lien is first because no work could have or did commence on the Augusta project until after [petitioner] recorded its deed of trust on the property [12-14-06]"

The circuit court held a bench trial in December of 2009. Augusta filed for Chapter 11 bankruptcy in February of 2010.¹

The circuit court entered a \$ 2,000,000 judgment against Augusta in favor of Landau and a judgment in favor of Laurita against Landau for the amount of Laurita's lien. The circuit court held that petitioner's deed of trust is junior in priority to the mechanic's liens of Landau and Laurita. The circuit court found that the "Consent of Contractor" signed by Landau is not a waiver of the right to file a future lien. The circuit court further concluded that petitioner could not have reasonably relied upon Landau's representations because the Consent of Contractor was not executed until *after* the closing. The circuit court held that Landau and Laurita's liens also take priority over the petitioner's lien because petitioner cannot claim equitable estoppel as a defense where the alleged misrepresentation occurred after the acts of reliance and petitioner had the means to discover whether construction had begun on the Augusta Apartments prior to closing. In entering the \$2,000,000 judgment against Augusta, the circuit court took judicial notice that this was the amount of the arbitration award.

The circuit court ordered the appointment of a special commissioner for the purpose of ascertaining the liens against the real property at issue, selling that real property, and satisfying from the proceeds of the sale, to the extent possible, the liens against that property after deducting the costs of the sale. The circuit court denied the post-trial motions filed by Augusta and petitioner.

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E. 2d 538 (1996). Petitioner challenges the judgment order entered by the circuit court on several grounds as set forth below.

"Consent of Contractor"

Petitioner argues that the circuit court erred in denying its motion for summary judgment and its motion for judgment as a matter of law given the existence of the "Consent of Contractor" document signed by Landau as part of the documents related to the closing of

¹ The bankruptcy stay was lifted to allow the circuit court to rule on the merits and for the purposes of this appeal.

the property.² Petitioner makes a related argument that the circuit court erred when it declined to apply equitable estoppel based upon its findings that petitioner could not have reasonably relied upon the “Consent of Contractor” document in making the loan as the document was signed *after* the closing and because petitioner could have easily verified whether work had actually started on the project by visiting the site prior to closing.

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’ Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E. 2d 770 (1963).” Syl. Pt. 1, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E. 2d 232 (1997). “The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.’ Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E. 2d 891 (1956).” Syl. Pt. 3, *Ryan v. Rickman*, 213 W.Va. 646, 584 S.E.2d 502 (2003) (per curiam). After careful review of petitioner’s arguments, the Court finds no error in the circuit court’s denial of summary judgment and in its decision that equitable estoppel is not available as a defense in this suit.

Attachment of Mechanic’s Lien

Petitioner next argues that the circuit court erred in finding that the mechanic’s liens could attach before Augusta purchased the property at issue. The circuit court found by a preponderance of the evidence that the work on the project began no later than December 11, 2006, which was prior to the closing. “A lien authorized and created by this article shall, when perfected, attach as of the date such labor, material, machinery or other necessary equipment shall have begun to be furnished, and shall have priority over any other lien secured by a deed of trust or otherwise which is created subsequent to such date.” *See* W.Va. Code § 38-2-17. Landau argues that petitioner’s argument must fail because the evidence showed that Laurita was performing work on the property on December 13, 2006, when the property was undoubtedly owned by Augusta due to the closing and delivery of the deed to Augusta on that date, but before petitioner recorded its deed of trust on December 14, 2006; therefore, the circuit court did not abuse its discretion and properly found that Landau and Laurita’s liens had priority over the Bank’s deed of trust. As there was substantial evidence to support the circuit

² The circuit court held that the document was not signed until after the closing.

court's finding of fact that the work was ongoing on December 13, 2006, the date of the closing and Augusta's assumption of ownership of the relevant property, and before the deed of trust was recorded by the petitioner, the Court declines to find that the circuit court's finding on this issue is clearly erroneous.

Stipulation as to Amount of Judgment

Finally, petitioner argues that the circuit court erred by taking judicial notice of the amount of the settlement reached by Landau and Augusta reflected in the arbitration consent award. "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E. 2d 469 (1998). Petitioner argues that it was not a party to the arbitration and that no evidence was presented or ruled upon in the arbitration proceeding to support such award as it was a consent award based upon the parties' agreement. Petitioner argues that given these factors that the circuit court could not take judicial notice of the amount of the judgment. As set forth above, rulings on the admissibility of evidence are committed to the sound discretion of the trial court. Upon review of the present case, this Court finds no reason to disturb the trial court's discretionary evidentiary ruling.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin