S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ABONMARCHE CONSULTANTS, INC.,

Plaintiff-Appellant,

v

MACATAWA BANK MORTGAGE CO.,

Defendant-Appellee,

and

NEWAYGO RIVERBANK, LLC, VISBEEN ASSOCIATES, INC., and DAN VOS CONSTRUCTION CO., INC.

Defendants.

UNPUBLISHED
November 19, 2009

No. 285281
Newaygo Circuit Court
LC No. 07-019232-CH

DAN VOS CONSTRUCTION CO., INC.,

Plaintiff-Appellant,

v

MACATAWA BANK MORTGAGE CO.,

Defendant-Appellee,

and

NEWAYGO RIVERBANK, LLC, ABONMARCHE CONSULTANTS, INC., and VISBEEN ASSOCIATES, INC.,

Defendants.

No. 285283
Newaygo Circuit Court
LC No. 07-019233-CH

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiffs Abonmarche Consultants (Abonmarche) and Dan Vos Construction Company (Dan Vos) appeal as of right the trial court's grant of summary disposition to Macatawa Bank Mortgage Company (Macatawa) in this dispute over the priority of encumbrances on property owned by Newaygo Riverbank LLC (Newaygo). We affirm.

Abonmarche and Dan Vos argue that the trial court erred by granting Macatawa's motion for summary disposition of their respective complaints to enforce construction liens. They claim there were, at least, questions of fact regarding whether work performed by Abonmarche and Dan Vos on the project to construct a mixed-use development for "high-end hunting, fishing and resort purposes" on 214 acres owned by Newaygo, related back to earlier road repair work performed by Terry Afton & Sons on an existing logging road on that same property. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). This Court also reviews de novo questions of statutory interpretation or application. *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 117; 667 NW2d 880 (2003); *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

The priority of construction liens relative to other encumbrances on property is governed by the Michigan construction lien act, MCL 570.1101, *et seq*. The construction lien act "was intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs." *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 121-122; 506 NW2d 43 (1997); see also, *MD Marinich, Inc v Michigan Nat'l Bank*, 193 Mich App 447, 453; 484 NW2d 738 (1992) ("It has long been recognized that the construction lien laws serve two purposes: to protect the right of lien claimants to payment for wages or materials and to protect owners from paying twice for such service."). The act

> continues to reflect the longstanding tradition of affording priority in the payment of those laborers, contractors, and suppliers who provide building blocks and whose physical efforts go into a construction project. The underlying intent and purpose of the act is to protect the right of lien claimants to payment for wages or materials when others have been provided with notice that there may be outstanding liens against the property because construction work is in progress. [*Id.* at 455.]

The act is also intended to protect mortgages from unknown lien claimants. *Id.* at 455-456. The Legislature has declared the construction lien act to be remedial and has specifically provided that it "shall be liberally construed to secure [its] beneficial results, intents and purposes." MCL 570.1302(1); *Vugterveen*, *supra* at 121; *Marinich*, *supra* at 453.

Section 119 of the act, MCL 570.1119, provides:

> (3) A construction lien arising under this act shall take priority over all garnishments, 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.
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> (4) A mortgage, lien, encumbrance or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act. The priority of the mortgage shall exist as to all obligations secured by the mortgage except for indebtedness arising out of advances made subsequent to the first actual physical improvement. An advance made pursuant to the mortgage, but subsequent to the first actual physical improvement shall have priority over a construction lien if, for that advance, the mortgagee has received a contractor's sworn statement as provided in [MCL 570.1110], has made disbursements pursuant to the contractor's sworn statement, and has received waivers of lien from the contractor and all subcontractors, laborers, and suppliers who have provided notices of furnishing . . .

The act defines an "actual physical improvement" 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 would alert a person upon reasonable inspection of the existence of an improvement." MCL 570.1103(1). Of particular note here, subsequent to the 1982 amendment of the act, "[a]ctual 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." *Id*.

It is undisputed that neither Abonmarche nor Dan Vos made any "actual physical improvement" to the property at any time. Thus, to paraphrase this Court in *Marinich*, *supra* at 456, the question is whether the Afton road repair work was the "the first actual physical improvement made for this project," such that the Abonmarche and Dan Vos construction liens "related back to" that work and thus, "under the Construction Lien Act, [those] lien[s were] superior to [Macatawa's] mortgage[s]" on the property. We conclude, as did the trial court, that the Afton road repair work was not part of the project for which Abonmarche and Dan Vos rendered services to Newaygo, and thus, that the Macatawa mortgages had priority over the construction liens at issue.

In *Marinich*, *supra* at 449, 451, this Court was faced with the question whether the construction lien of a successor general contractor, hired "to take over and complete" a construction project in place of the initial general contractor, related back to the date of commencement of construction by the initial general contractor, so as to have priority over a mortgage recorded after the commencement of construction by the initial general contractor but before the successor general contractor was hired. Notably, there was no dispute in *Marinich* that the initial general contractor and the successor general contractor were hired to perform work on the *same project*, nor that the first actual physical improvement *for that project* occurred before the mortgage was recorded. Following an evidentiary hearing, the trial court concluded that the lien of the successor general contractor did relate back to the first actual physical improvement on the property by the initial general contractor, thus giving the lien priority over

the subsequently recorded mortgage. This Court affirmed. In so doing, it first provided an overview of the historical development of Michigan law regarding mechanic's liens:

> The development of this area of the law before 1958 was discussed by the Michigan Supreme Court in *Williams & Works, Inc v Springfield Corp*, 408 Mich 732, 740-743; 293 NW2d 304 (1980). Under prior statutes and case law, the commencement of a building provided notice to all parties of the existence of mechanics' liens emanating from work performed in the construction of the building. *Id.* at 742. In *Kay v Towsley*, 113 Mich 281, 283; 71 NW 490 (1897), the Court held that mechanics' liens had priority over mortgages that attached after the commencement of the building "though no part of the labor performed or materials furnished for which the lien is claimed was done or performed until after the execution and recording of the mortgage." *Id.* at 283.
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>> It is held that, under such a provision, liens attach as of the date of the commencement of the building, erection, or other improvement, regardless of the time when, or the person by whom, the particular work was done or the materials furnished for which a lien is claimed. [*Id.*]
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> It was this "visible notice" when the first permanent work was done on the land that fixed a "date to which all mechanics' liens related back, even if other contractors started their work weeks or months later." *Williams & Works*, *supra* at 743. The physical work began on a building or land where the building would sit provided prospective lenders or purchasers constructive notice of potential liens. *Id.* at 742. Inequities that would otherwise result if a mortgagee were allowed to assert its lien against property for a construction loan to secure repayment by the sale of materials or work supplied by lien claimants were remedied by construction or mechanics' lien statutes so "that those who make loans after the work on the building has been commenced must take subject to valid mechanics' liens acquired incident to such construction." *Winkworth Fuel & Supply Co v Bloomsbury Corp*, 266 Mich 298, 302; 253 NW 304 (1934). [*Id.* at 452-453.]

Thus, this Court noted, historically, the commencement of construction on a project affords to all liens resulting from work performed as part of that project priority over any subsequently recorded encumbrances. *Id.*

The *Marinich* Court also observed that "[o]ur Legislature enacted the Construction Lien Act . . . in order to remedy many of the problems associated with a preceding act, the Mechanics' Lien Act of 1891," and that "[i]n order to ascertain and give effect to legislative intent, the changes in the act must be construed in light of the preceding statutes and the historical legal development of mechanics' or construction liens." *Id*. at 452-453. The Court explained that it found "nothing in the Construction Lien Act that indicates that the Legislature intended to change how construction liens traditionally relate back to the date when construction commenced." *Id.* at 454-455. And, it further observed that the only limits on construction liens it could "discern from the act are that the amount of a claim cannot exceed the amount of a

contract, MCL 570.1107(1), (6), and the improvements made must relate to the project as referred to in the notice of commencement, MCL 570.1108(1) . . ." *Id.* at 457.

Applying *Marinich* here, we agree with the trial court that Abonmarche and Dan Vos failed to submit sufficient evidence to create a genuine issue of material fact as to whether the Afton road repair work was part of the same construction project for which these parties performed work for Newaygo. There is no reference to the road repair work in any documentation generated by Abonmarche, Dan Vos or Newaygo, the road was not going to serve as the construction entrance for the project, and seemingly, neither Abonmarche nor Dan Vos were aware of the road repair work until after this litigation commenced. The only assertion that Abonmarche and Dan Vos have made to support the conclusion that the Afton road repair work related to the development project is that the repaired road corresponds to approximately 1000 feet of the road layout for the finished project. However, especially considering the scope of the project, this information, without more, does not suffice to establish a genuine question of material fact on this issue.

While Macatawa's motion for summary disposition was pending, Dan Vos filed a motion to hold the proceeds of the foreclosure sale of the property in escrow pending resolution of the priority of the parties' liens. In response to that motion and in further support of its own motion for summary disposition, Macatawa filed an affidavit from John Afton describing the timing and extent of the road repair work at the property. On appeal, Abonmarche and Dan Vos challenge the trial court's decision to consider that affidavit before ruling on Macatawa's motion, asserting that the affidavit was required to be served on them at least 21 days before the hearing on Macatawa's motion for summary disposition, pursuant to MCR 2.116(G)(1)(a)(ii), because the affidavit represented a "change in course" from the arguments asserted in Macatawa's motion for summary disposition. We disagree.

The Afton affidavit was attached to Macatawa's response to Dan Vos's motion. The court rules provide that a response to a motion is to be served at least three days before the hearing on the motion if hand delivered to the opposing party or to its attorney. MCR 2.119(C)(2)(b). Macatawa complied with these requirements. Thus, the trial court was permitted to consider the Afton affidavit.

Next, Abonmarche and Dan Vos assert that, because no notice of commencement was recorded by Newaygo, Macatawa cannot now argue that the Afton road work differed from the project on which Abonmarche and Dan Vos were working, and that absent a notice of commencement, the nature and scope of the "project" for purposes of evaluating the construction liens at issue, is "at minimum" a question of fact. Again, we disagree.

Macatawa was not required to record a notice of commencement – that duty falls to the property owner or lessee contracting for the improvements. MCL 750.1108. Pursuant to the construction lien act, "[b]efore the commencement of any actual physical improvements to real property,"[1] Newaygo was required to record a notice of commencement in the office of the

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[1] Macatawa comments that "[t]here is no notice of commencement for the Project because the (continued…)

county register of deeds, to post the notice of commencement at the property, and to provide a copy to the general contractor, as well as to any contractor, subcontractor, supplier or laborer requesting a copy. MCL 570.1108(2), (5), (8), (9). The notice of commencement is not required to include any description of the project. Thus, its absence here has no bearing on the definition of the project for purposes of determining the priority of the Abonmarche or Dan Vos liens. And, while the failure to record a notice of commencement or to provide a copy upon request in accordance with the act extends the time during which a notice of furnishing may be submitted and may entitle a contractor to reimbursement of costs incurred in obtaining the notice of commencement from the owner, MCL 570.1108(10)-(13), it does not affect the priority of liens on the property in any manner relevant here. Further, considering their respective roles in the project, Abonmarche and Dan Vos would certainly be aware of all construction work that was within the scope of the project. That they apparently were unaware of the Afton road work until after litigation commenced, and that they are unable to point to anything, other than the fact that the repaired road coincides for a relatively brief stretch with the intended road layout for the development, to establish that the Afton repair work was part of the project is telling.

Finally, Abonmarche and Dan Vos also assert that Macatawa failed to establish that its mortgages secured prior indebtedness, and not future advances, so to afford the mortgages with priority over the construction liens under MCL 570.119(4). However, it is undisputed that, except for the Afton road repair work, no physical improvement was undertaken at that property at any time before the foreclosure. Thus, because the Afton Road repair work was not part of the same project for which Abonmarche and Dan Vos were hired by Newaygo, Macatawa's mortgages have priority over claims by Abonmarche and Dan Vos regardless when the funds underlying them were actually disbursed to Newaygo. Further, the purpose of the Macatawa's mortgages was to fund the purchase of the four individual parcels that would comprise the property; Newaygo in fact purchased those parcels. This purchase is sufficient to establish that the funds were advanced to Newaygo in advance of, or simultaneous with, the execution of the mortgage.

Because we find that the trial court's decision granting Macatawa's motion for summary disposition was appropriate, we also conclude that its decision denying Abonmarche's and Dan Vos's motions for reconsideration of that decision was not an abuse of the trial court's discretion. *Woodard v Custer,* 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450 NW2d 6 (1989).

We affirm. Macatawa, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey

(…continued)

Project was never begun."