

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CONTROLS GROUP, INC.,  
an Illinois corporation,

Plaintiff-Appellant,

v

HOMETOWN COMMUNICATIONS  
NETWORK, INC., a Michigan corporation, f/k/a  
& a/k/a SUBURBAN COMMUNICATIONS  
CORPORATION, AMERICAN EQUITY  
INVESTMENT INSURANCE COMPANY, an  
Iowa corporation, and OBSERVER AND  
ECCENTRIC NEWSPAPERS, INC., a Michigan  
corporation,

Defendant-Appellee,

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UNPUBLISHED  
June 20, 2006

No. 266347  
Wayne Circuit Court  
LC No. 04-417433-CH

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) of plaintiff's construction lien claim.

Defendant Observer and Eccentric Newspapers ("Observer") was at all times relevant to this proceeding a subsidiary of defendant Hometown Communications Network, Inc. ("Hometown").<sup>1</sup> Observer leased its Livonia printing facility from Hometown, which owned the real property. On March 31 and April 1, 2003, Observer contracted with Bob Ray & Associates ("Bob Ray") to transport, refurbish, and install in its Livonia facility two previously owned printing units and a color "half-deck" that Observer was purchasing. Bob Ray subcontracted with plaintiff Controls Group to supply parts and equipment and some technical support to complete the upgrade of the inking components or the presses.

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<sup>1</sup> On March 31, 2005, all of Hometown's assets were sold to Gannett Publishing; the Observer became a wholly owned subsidiary of Gannett Publishing.

The project was completed in September of 2003. In October of 2003, Bob Ray ceased all business operations, and on March 9, 2004, filed a voluntary Chapter 7 bankruptcy petition. Bob Ray's secured creditor, Elgin State Bank, retains as collateral an unpaid account receivable of \$217,200 owed by defendant Observer. Plaintiff Controls Group asserts that Bob Ray failed to pay it the whole amount due under their contract, and that \$96,551.31 is still owed. On November 19, 2003, within 90 days of the last day of furnishing labor or materials to the project at the Livonia facility, plaintiff Controls Group recorded a Claim of Lien on the Livonia property with the Wayne County Register of Deeds. On February 27, 2004, plaintiff received a default judgment against Bob Ray in Illinois state court for \$96,551.31 plus costs of suit and interest.

On June 8, 2004, plaintiff filed a complaint requesting a judgment that plaintiff has a construction lien on defendant Hometown's Livonia property to secure payment of the judgment against Bob Ray, relying on the Michigan Construction Lien Act ("CLA"), MCL 570.1101, *et seq.* Plaintiff also requested a judgment that its lien be prior and superior to the interest of defendants in the property. Finally, plaintiff requested that if payment were not made within 21 days of judgment that the construction lien was valid, the court should order the property to be sold and the proceeds applied to pay the judgment.

On June 3, 2005, defendants Hometown and Observer filed a motion for summary disposition of plaintiff's complaint under MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that the CLA did not provide a remedy for Controls Group because the press units are not fixtures. On September 30, 2005, after hearing oral arguments from the parties, the trial judge granted the motion, stating without explaining his reasoning:

I read this with a great deal of interest, and I came to the conclusion long ago, prior to the oral argument in this case, that these printing presses are not fixtures. And that being the situation, the Court is of the opinion that the Construction Lien Act doesn't apply. So the motion's granted.

Plaintiff filed this appeal, arguing that "[t]he Press is unquestionably a fixture," or in the alternative that "minimally, there is an issue of fact as to whether the printing press is a fixture."

This Court reviews summary disposition determinations *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim, and may be granted only if, after reviewing all evidence in the light most favorable to the non-moving party, the court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* at 119-120.

The CLA provides the construction lien remedy: "Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property shall have a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property." MCL 570.1107. The CLA defines "improvement" as:

the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling,

building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract.

MCL 570.1104(7). The CLA plainly does protect subcontractors who engage in the listed tasks, and the “including, but not limited to” language suggests other activities similar to those enumerated could be added. The common thread linking the listed activities is a direct impact on the realty. Here however, plaintiff supplied materials and technical support for the upgrading of items that were installed in a building; plaintiff did not itself install or affix a fixture, or take any other action directly impacting the realty. We find as a threshold matter that because plaintiff did not engage in any of the listed activities, or any activities similar enough to fall under the same umbrella, plaintiff is not entitled to the protection of the CLA.

Because the trial court based its decision on the issue of whether the presses are fixtures, we will address that issue as well. The test to establish whether an item is a fixture was established by our Supreme Court in *Morris v Alexander*, 208 Mich 387, 390-391; 175 NW 264 (1919):

first, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold.

See also *Wayne County v Britton Trust*, 454 Mich 608, 615; 563 NW2d 674 (1997); *Mich. Nat'l Bank v City of Lansing*, 96 Mich App 551, 554; 293 NW2d 626 (1980).

The parties agree that the first two prongs are met; the only remaining issue is whether the presses were intended as permanent accessions to the realty. Plaintiff relies on *Michigan National* for the proposition that permanence does not mean perpetuity: “It is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose.” *Michigan National, supra* at 554. Plaintiff argues that defendants had admitted they intended to leave the presses in place in perpetuity as defined by *Michigan National*, citing this deposition testimony by Peter Neill:

Q: So for all intents and purposes, the new units . . . were intended to remain there until there was a business reason to move them, such as they're worn out . . . or they were superseded by some other business reason, new technology, whatever it may be?

A: Yeah, that would be correct.

However, as *Morris* clarified, “whether an article attached to the freehold becomes a fixture depends largely upon the intention of the parties.” *Morris, supra*, at 390. And *Michigan National* affirmed that “[t]he intention which controls is that manifested by the objective, visible facts.” *Michigan National, supra* at 554. See also *Wayne County, supra*, at 619. Here Peter Neill stated in his deposition that a decision could be made, for business reasons, to sell, upgrade, or move a press, but clarified that “[y]ou wouldn't leave it there if you sold the building, you've

got too many dollars invested.” And Richard Aginian stated in his deposition that the presses were specifically excluded from the mortgage on the building because their value is separate and apart from the building, and they are sufficiently valuable to merit separate financing. The mortgage executed on March 20, 2003 between Hometown and AEIIC specifically excluded the presses and other equipment used by Observer from the listing of fixtures and other personal property belonging to Hometown and serving as collateral securing the loan. The financing statement filed by AEIIC also explicitly excluded the presses as collateral, and no fixture filing was ever made by AEIIC. According to Aginian, the presses were taxed separately as personal, rather than real, property. Taken altogether, defendants have provided significant evidence that they did not intend the presses to be permanent accessions to the realty, and that the presses were not treated as fixtures in any financial dealings.

Plaintiff argues that the size and weight of the presses and the fact that part of a wall was moved to install the presses tend to show the intention of a permanent annexation. However, the fact that defendant Observer purchased these presses from a similarly situated user of the equipment, had them moved to Michigan and installed in defendant Hometown’s building contradicts this argument. The presses are movable, saleable equipment, and their large size and significant weight do not necessarily categorize them as fixtures.

Plaintiff argues that the fact that printing is the main function of that area of the realty indicates the intention of a permanent annexation. Our Supreme Court, in *Peninsular Stove Co. v Young*, 247 Mich 580, 582 (1929), did find that intent “might well be inferred” from “the use to be made of” the realty. In that case, a building was designed specifically to serve as an apartment house, with a family in each apartment. *Id.* The fixtures in question were gas ranges installed in each apartment; the court determined that annexation of such appliances was necessary for the purpose for which the building had been designed to be served, and the appliances were therefore permanent fixtures. *Id.* However the same reasoning cannot be applied here, where the building in question might have varied industrial or commercial uses not related to printing presses.

Accession requires more than bolting a piece of equipment to the floor to serve a particular purpose, whether permanently or indefinitely. Our Supreme Court in *Continental Cablevision of Michigan, Inc. v Roseville*, 430 Mich 727, 737; 425 NW2d 53 (1988) noted that the definition of “accession” “implies a transfer of ownership and control over the property attached.” The court added that “[t]his notion of intent to transfer ownership has long been considered the pivotal question in fixture analysis.” *Id.* at 737, fn 13. Here the issue is somewhat complicated since the owner of the presses and lessee of the building, Observer, was a subsidiary of the lessor of the realty, Hometown. However there is no indication or evidence that Observer intended to transfer control or ownership to Hometown as part of the building, and Neill clearly stated in his deposition that if Observer moved to a new location, Observer would sell or move the presses at that time.

We hold that where, as here, a subcontractor’s work was limited to providing materials and limited technical support for improvements to an item to be installed in a building, the Construction Lien Act does not apply. We further find that on these facts, the printing presses were not fixtures. The dispositive issue is the intent of the owner of the items, and here while defendant Observer has proffered evidence that they did not intend the presses to become

permanent accessions to defendant Hometown's realty, plaintiff has proffered no evidence that they did so intend. Summary disposition for defendants was therefore properly granted.

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello