

STATE OF MICHIGAN
COURT OF APPEALS

ASPHALT SPECIALISTS, INC.,

Plaintiff/Counter-Defendant-
Appellee,

UNPUBLISHED
April 19, 2011

v

STEVEN ANTHONY DEVELOPMENT
COMPANY, GTR COMPANIES, GLACIER
CLUB TWO, INC., GLACIER CLUB ONE, INC.,
GLACIER DEVELOPMENT COMPANY, INC.,
GTR BUILDERS, INC., ARLINGTON TRANSIT
MIX, ROBERT F. TEMPLE, d/b/a CURRENT
ELECTRIC CONTRACTING, JP MORGAN
CHASE, BOARD OF COUNTY ROAD
COMMISSIONERS, WASHINGTON
ASSOCIATES, L.L.C., NAGY CONCRETE
COMPANY, NATIONAL CITY BANK OF THE
MIDWEST, d/b/a NATIONAL CITY BANK and
FEDERAL DEPOSIT INSURANCE COMPANY,

Defendants/Cross-Defendants,

and

GTR GLACIER GOLF HOLDINGS,

Defendant/Cross-
Defendant/Counter-Plaintiff,

and

GTR GLACIER CLUB, L.L.C.,

Defendant/Third-Party Defendant/
Cross-Defendant,

and

LAKEVIEW CONTRACTING, INC.,

No. 295182
Macomb Circuit Court
LC No. 2007-001854-CK

Defendant/Third-Party
Plaintiff/Counter-Plaintiff-Appellee,

and

TONY ANGELO CEMENT CONSTRUCTION
COMPANY,

Defendant/Third-Party
Plaintiff/Counter-Plaintiff/Cross-
Defendant,

and

WELLS VENTURE CORPORATION,

Defendant/Counter-Plaintiff/Cross-
Defendant-Appellant,

and

A & R SEALCOATING, INC.,

Defendant/Counter-Plaintiff/Cross-
Defendant-Appellee.

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Wells Venture Corporation (“WVC”) appeals as of right the circuit court’s judgment for Lakeview Contracting, Inc. (“Lakeview”). In particular, WVC challenges the portions of the circuit court’s judgment, and two other contemporaneous judgments in favor of Asphalt Specialists Inc. (“ASI”) and A & R Sealcoating, Inc. (“A & R”) that: 1) imposed liens by Lakeview, ASI, and A & R against WVC’s golf course; 2) ordered the golf course to be sold to satisfy those liens; and 3) awarded attorney fees, including the award of attorney fees in the liens. We vacate the challenged portions of the judgments and remand for further proceedings.

I. FACTS

This action arises out of a March 14, 2005 land contract between WVC and GTR Glacier Golf Holdings (“Golf Holdings”) for the purchase of a golf course, in Washington Township. The land contract was scheduled to mature in September 2008. In April 2006, Lakeview

contracted with GTR Glacier Club, L.L.C.¹ to provide materials and labor for the installation of infrastructure improvements, including water, sanitary sewer, and storm sewer lines, at the golf course. In June 2006, ASI contracted with GTR Companies² for the construction and asphalt paving of the golf cart paths at the golf course. In July 2006, A & R also began performing a contract to provide Golf Holdings with asphalt paving labor and materials for the golf course.

There is no dispute that Lakeview, ASI, and A & R were not fully compensated for their improvements to the golf course. These parties filed claims of lien on the golf course in 2007, and instituted actions in the circuit court for breach of contract, unjust enrichment, and foreclosure on their liens.³ Golf Holdings, as land contract vendee, and WVC, as land contract vendor were among the defendants to these actions. WVC argued that its interest as a land contract vendor had priority over the lien claimants' interests pursuant to MCL 570.1119(4). Furthermore, by 2008, Golf Holdings had failed to make payments to WVC on the land contract, so WVC filed a cross-claim in the circuit court to accelerate the remaining amount due. WVC also filed a separate action in the district court to obtain a judgment of possession after land contract forfeiture.

On October 1, 2009, the circuit court issued an opinion and order, based on the parties' briefs and without a trial, regarding the breach of contract, unjust enrichment, and foreclosure claims. The circuit court rejected WVC's argument that its interest as a land contract vendor had priority over the liens. Next, the circuit court found that Lakeview, ASI, and A & R were entitled to unpaid compensation, contractual interest, statutory attorney fees, and taxable costs, and that these amounts would be paid pursuant to a final order of distribution of sale proceeds from the golf course, MCL 570.1121(4). Finally, the circuit court ordered that Lakeview, ASI, and A & R should prepare judgments based on the opinion and order within 20 days.

Shortly after this opinion and order was issued, on October 5, 2009, WVC obtained a judgment of possession after land contract forfeiture in the district court. This judgment provided that Golf Holdings materially breached the land contract by failing to pay \$687,644.45,

¹ According to the record, GTR Glacier Club L.L.C. had an ownership interest in phases of real estate development associated with the golf course.

² ASI alleged below that GTR Companies, GTR Glacier Golf Holdings, GTR Glacier Club, L.L.C., Glacier Club Two, Inc., Glacier Club One, Inc., Glacier Development Company, Inc., and GTR Builders, Inc. ("GTR defendants") operated as alter egos. Although GTR defendants denied this allegation, the parties on appeal treat GTR defendants as interchangeable entities and do not argue whether the identity of the individual GTR defendants that contracted for the improvements could affect the claim of lien. Therefore, we do not reach that question in this opinion.

³ Tony Angelo Cement Company also filed a cross-claim regarding unpaid compensation for improvements to the real estate development associated with the golf course, which is not at issue on appeal.

plus interest, and if Golf Holdings failed to cure the breach within 90 days, an order of eviction could be issued.

On November 2, 2009, the circuit court entered three judgments in favor of Lakeview, ASI, and A & R, finding that these parties have liens on the golf course that are superior to all other claims. First, the circuit court concluded that Lakeview was entitled to \$77,655.50 for unpaid compensation, \$22,668.52 for contractual interest, and \$32,487 for attorney fees. Next, the circuit court concluded that ASI was entitled to \$163,298.89 for unpaid compensation, \$84,518.72 for contractual interest, \$65,147.40 for attorney fees, and \$150 for costs. The circuit court also awarded to A & R \$8,375 for unpaid compensation, \$11,308.98 for attorney fees, and \$287.38 for costs. Lastly, the circuit court ordered the golf course to be sold to satisfy the liens, MCL 570.1121. The circuit court did not address the effect of the district court's intervening judgment of possession. This appeal followed.

II. ATTACHMENT

On appeal, WVC argues that, after the judgment of possession, the liens attached to the improvements of the property only. WVC therefore argues foreclosure of WVC's entire interest in the golf course was error. We agree.

This Court may review plaintiff's unpreserved argument because it is a question of law and all the facts necessary for its resolution have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). This Court reviews de novo matters of equity, including foreclosure, and issues of statutory construction. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *Mitchell v Dahlberg*, 215 Mich App 718, 727; 547 NW2d 74 (1996). Statutory construction discerns and gives effect to the Legislature's intent. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). In determining that intent, the court first looks to the language of the statute. *Id.* The interpretation of the language must accord with the legislative intent. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). As far as possible, the court gives effect to every phrase, clause, and word in the statute. *Id.* "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Id.* (quotation marks and citations omitted). Courts read a statute as a whole, and individual words and phrases, while important, are read in the context of the entire legislative scheme. *Id.*

"[U]nder a land contract, although the vendor retains legal title until the contractual obligations have been fulfilled, the vendee is given equitable title, and that equitable title is a present interest in realty that may be sold, devised, or encumbered." *Graves v American Acceptance Mtg Corp*, 469 Mich 608, 614; 677 NW2d 829 (2004). MCL 570.1107 provides in relevant part:

- (1) Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property, as described in the notice of commencement given under section 108 or 108a, the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has

required the improvement. A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract.

(2) A construction lien under this act attaches to the entire interest of the owner or lessee who contracted for the improvement, including any subsequently acquired legal or equitable interest.

(3) Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property to which the person contracting for the improvement had no legal title has a construction lien upon the improvement for which the contractor, subcontractor, supplier, or laborer provided labor, material, or equipment. The forfeiture, surrender, or termination of any title or interest held by an owner or lessee who contracted for an improvement to the property, an owner who subordinated his or her interest to the mortgage for the improvement, or an owner who has required the improvement does not defeat the lien of the contractor, subcontractor, supplier, or laborer upon the improvement.

“Owner” means a person holding a fee interest in real property or an equitable interest arising out of a land contract.” MCL 570.1105(3).

When Lakeview, ASI, and A & R contracted with GTR Glacier Club L.L.C., GTR Companies, and Golf Holdings respectively to improve the golf course, WVC retained legal title to the golf course and Golf Holdings had equitable title. *Graves*, 469 Mich at 614. Thus, both WVC and Golf Holdings were “owners” at that time. MCL 570.1105(3). However, there is no evidence that WVC contracted for or required the improvements. Once WVC obtained a forfeiture of Golf Holdings's interest and judgment of possession, and the circuit court entered judgments finding that Lakeview, ASI, and A & R had liens on the golf course, none of the contracting parties, particularly Golf Holdings, remained “owners” with an “interest” in the golf course to which liens could attach, MCL 570.1107(1). In any event, according to the plain language of MCL 570.1107(3), the construction liens upon the improvements for which Lakeview, ASI, and A & R provided labor and materials were not defeated by the forfeiture.

MCL 570.1121(1) addresses the circuit court's power with respect to a judgment of foreclosure:

If the court finds that a lien claimant is entitled to a construction lien upon the real property to which he or she furnished an improvement, and the amount adjudged to be due has not been paid, the court may enter a judgment ordering the sale of any interest in the real property, or a part of the real property, to which the construction lien attaches. If the construction lien attaches only to the improvement furnished, the court may order a sale of the improvement. If the court finds that there is an interest in or encumbrance against the real property which is superior to the construction lien being foreclosed, the order for sale shall indicate that fact. The court may order a construction lien satisfied out of the rents, profits, and income from the real property to which the construction lien has attached.

Where lien claimants are only entitled to construction liens on the improvements furnished, the court has discretion to order a sale of the improvement. The discretion to order the sale of “any interest in the real property,” MCL 570.1121(1) (emphasis added), is conditioned upon the court’s finding that lien claimants are entitled to construction liens upon the real property. Because Lakeview, ASI, and A & R were not entitled to construction liens upon the real property (golf course), we conclude that the circuit court erred by ordering its sale.

ASI counters that WVC’s “entire interest” should be subject to the construction lien. ASI relies on MCL 570.1107(5), which provides:

For purposes of this act, if the real property is owned or leased by more than 1 person, there is a rebuttable presumption that an improvement to real property under a contract with an owner or lessee was consented to by any other co-owner or co-lessee. If enforcement of a construction lien through foreclosure is sought and the court finds that the improvement was consented to by a co-owner or co-lessee who did not contract for the improvement, the court shall order the entire interest of that co-owner or co-lessee, including any subsequently acquired legal or equitable interest, to be subject to the construction lien. A deficiency judgment shall not be entered against a noncontracting owner, co-owner, lessee, or co-lessee.

“Co-owner” means a person having an interest in real property, the nature of which is identical to that of the interest of the owner who contracted for the improvement to the real property, whether the extent of such interest is identical or not.” MCL 570.1103(6). Although Golf Holdings had an equitable interest in the property at the time the contracts for improvements were created, it did not have an interest identical to WVC—the legal title holder. Therefore, Golf Holdings and WVC were not co-owners under MCL 570.1107(5) and ASI’s argument fails.

ASI and Lakeview also contend that, if the circuit court cannot foreclose on the golf course, the only remaining remedy would be foreclosure of the improvements. However, because the improvements made here were for the infrastructure of the golf course (e.g. golf cart path paving and sewer lines) and are not severable from the golf course, they could not be sold. ASI and Lakeview argue that such an outcome is contrary to the remedial nature of the Construction Lien Act intending to protect the rights of lien claimants to payment for expenses.⁴ WVC responds, and we agree, that foreclosure of an improvement is not a lien claimant’s only avenue for payment under these circumstances. For example, MCL 570.1107(4) provides:

⁴ Contrary to ASI’s claim on appeal, our interpretation of MCL 570.1107 will not preclude all contractors who deal with equitable titleholders from seeking remedy under the Construction Lien Act, but only limits that remedy to a lien upon the improvement under the particular circumstances presented here where forfeiture of the equitable titleholder’s preceded enforcement and foreclosure.

If the rights of a person contracting for an improvement as a land contract vendee or a lessee are forfeited, surrendered, or otherwise terminated, any lien claimant who has provided a notice of furnishing or is excused from providing a notice of furnishing under section 108, 108a, or 109 and who performs the covenants contained in the land contract or lease within 30 days after receiving actual notice of the forfeiture, surrender, or termination is subrogated to the rights of the contracting vendee or lessee as those rights existed immediately before the forfeiture, surrender, or termination.

WVC also argues, that prior to contracting with a land contract vendee, a contractor could negotiate for: 1) the land contract vendor to be included as a contracting party, MCL 570.1107(1), 2) the land contract vendee to post collateral as security in the event of non-payment and forfeiture, or 3) payment in full or in increments prior to the completion of work. Moreover, Lakeview, ASI, and A & R could arguably pursue a claim against WVC outside the Construction Lien Act for unjust enrichment.

Again, we conclude that following the forfeiture and judgment of possession, the liens attached to the lien claimants' improvements and it was error to order foreclosure of the golf course to satisfy those liens.

III. ATTORNEY FEES

WVC also challenges the portion of the circuit court's judgment that includes the attorney fee award in the total to which the lien claimants are entitled under their construction liens. WVC maintains that attorney fees should be excluded from the construction liens. We agree.

Generally, attorney fees are not recoverable unless expressly allowed by statute, court rule, judicial exception, or contract. MCL 570.1118(2) provides:

In an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. *The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party.* The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious. [Emphasis added.]

Although MCL 570.1118(2) makes attorney fees recoverable by a lien claimant who is the prevailing party, this subsection does not address whether the attorney fees should be included in or excluded from the lien claimant's entitlement under the construction lien. "[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003), quoting *Gen Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 255, 249 NW2d 41 (1976) (opinion by Coleman, J.); see also *Bush*, 484 Mich at 167. MCL 570.1107(1) provides, in relevant part, "A construction lien acquired pursuant to this act

shall not exceed the amount of the lien claimant's contract less payments made on the contract." By adding the attorney fee award to the amount remaining to be paid on the lien claimants' contracts, the circuit court violated MCL 570.1107(1).⁵

ASI and Lakeview question the general rule in MCL 570.1107(1) that a construction lien shall not exceed the amount remaining to be paid on a lien claimant's contract by citing MCL 570.1121(2), which provides:

In a judgment of foreclosure, the court may provide for adding to the amount determined to be due any amount paid by any lien claimant, mortgagee, or receiver appointed by the court, after the foreclosure sale and before the expiration of the period of redemption, for taxes assessed against the real property sold or for that portion of the premium of an insurance policy covering the building located on the real property, which premium portion is required to keep the policy in force until the expiration of the period of redemption. After the making of any tax or premium payments, an affidavit with respect to the payments shall be recorded immediately in the office of the register of deeds for the county in which the deed on foreclosure sale was recorded.

However, even if the general rule in MCL 570.1107(1) does not apply where the court adds to the amount due on the lien taxes or a portion of an insurance premium under MCL 570.1121(2), ASI and Lakeview fail to cite to similar language in the act allowing a court to add attorney fees to the amount due on the lien.

Last, WVC argues that Lakeview, ASI, and A & R failed to meet their burden of proving the reasonableness of requested attorney fees and the circuit court abused its discretion by failing to hold an evidentiary hearing when WVC challenged the amount of the attorney fees and by failing to make findings of fact on the record. This Court reviews the circuit court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).

Lakeview and ASI rely on *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999) for the proposition that an evidentiary hearing is not required where "the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision." This is not the case here. The only evidence in the record to aid appellate review is an affidavit by each lien claimant's attorney asserting the fees incurred to date.

⁵ We note that in *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 382-383; 652 NW2d 474 (2002), this Court determined that a trial court did not err by entering an award of attorney fees as a personal judgment against the defendants instead of a lien against the real property.

In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. [*Smith v Khouri*, 481 Mich 519, 537; 751 NW2d 472 (2008).]

The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), mod *Smith*, 481 Mich 519, and MRPC 1.5(a).⁶ Because the circuit court did not engage in the analysis required by *Smith* and failed to make any findings regarding the relevant factors, we vacate the award of attorney fees and remand for reconsideration in light of *Smith*.

We vacate the portions of the judgments finding that the liens attached to the golf course, ordering the foreclosure sale of the golf course, awarding attorney fees and including the award

⁶ The *Wood* factors are:

“(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.” [*Wood*, 413 Mich at 588 (citation omitted).]

The factors listed in MRPC 1.5(a) are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

of attorney fees in the amount due on the liens. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.⁷

WVC having prevailed on appeal is entitled to costs. MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio

⁷ As a result of the judgment of possession after land contract forfeiture, we decline to address WVC's argument that its interest in the golf course as a land contract vendor had priority over the liens by Lakeview, ASI, and A & R under MCL 570.1119(4).