

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

ARCHITECTURAL STAINLESS, INC.,
d/b/a/ ASI EQUIPMENT,
Plaintiff,

vs.

Case No. 18-2821-CB

KARET PROJECTS, LLC, THOMAS LEFEVRE,
TM PARTRIDGE CREEK MALL, L.P., ROBERT
LEITHAUSER, GWENDOLYN LEITHAUSER, and
TOPLESS INTERIORS, LLC, jointly and severally,
Defendants.

OPINION AND ORDER

Defendant Partridge Creek Mall, L.P. ("Partridge Creek") filed a motion for summary disposition under MCR 2.116(C)(10). Plaintiff Architectural Stainless, Inc. d/b/a ASI Equipment ("ASI Equipment") also seeks summary disposition under MCR 2.116(I)(2).

I. Factual and Procedural Background

Partridge Creek owns certain real property located at 17470 Hall Road, R106, Clinton Township, Michigan. Amended Answer ¶14 ("the Property"). Defendant Karet Projects, LLC ("Tenant") leased space at the Property from Partridge Creek and operated a restaurant there. Tenant contracted with ASI Equipment for the design and installation of kitchen equipment for the restaurant. To secure payment, ASI Equipment filed a claim of lien for \$213,389.20 with the Register of Deeds for Macomb County on December 11, 2017 against the Property. According to the Amended Complaint, an outstanding balance of \$213,389.20 remains excluding interest and fees.

On January 2, 2019, ASI Equipment filed an Amended Complaint alleging: count I, foreclosure of the construction lien; count II, breach of contract; count III, unjust enrichment; count IV, account stated; and count V, fraudulent misrepresentation.

Partridge Creek moves for summary disposition on count I only because counts II through V concern other parties. The Court took the matter under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121. Indeed, “an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4).

III. Arguments

Partridge Creek seeks summary disposition on count I of the Amended Complaint for foreclosure of the construction lien for the following reasons: 1) none of the claimed improvements remain at the Property; 2) under the Construction Lien Act (“CLA”), when the party contracting for an improvement does not own the real property,

the lien attaches only to the improvement and not the real property; 3) this case does not fall under the exception permitting the lien to attach to the real property where the tenant acts as landlord's agent when contracting for the improvement because no evidence supports an agency relationship between Partridge Creek and Tenant for the agreement with ASI Equipment; 4) the equipment, as trade fixtures, did not become part of the Property. Partridge Creek maintains that it would bear all of the burden yet receive none of the benefit of the contract if the Court were to enforce the lien.

In Response, ASI Equipment argues that the Lease required the improvements, which attached to the Property. Specifically, ASI claims the improvements affected utility systems and were more than cosmetic alterations. ASI Equipment emphasizes that the Court previously found a question of fact when considering whether the Lease required the improvements such that Tenant may have acted as an agent of Partridge Creek. According to ASI Equipment, Partridge Creek's reliance on the "trade fixtures" doctrine is misplaced because those cases predate the CLA, which became effective in 1982. Further, the trade fixture approach focuses on permanence versus improvement as defined in the CLA. ASI Equipment also maintains the doctrine of judicial estoppel prevents Partridge Creek from contesting the lien.

IV. Law and Analysis

The CLA states, 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(1) emphasis added. 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) emphasis added. Subsection (3) of the CLA addresses improvements to property where the party contracting for the improvement has no legal title to the property. Specifically the CLA states,

Each contractor . . . 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* . . . The forfeiture, surrender, or termination of any title or interest held by . . . lessee who contracted for an improvement to the property . . . or an *owner who has required the improvement does not defeat the lien* of the contractor, subcontractor, supplier, or laborer upon the improvement.

MCL 570.1107(3) emphasis added. The CLA “is a remedial statute that sets forth a comprehensive scheme aimed at protecting the rights of lien claimants to payment for expenses and the rights of property owners from paying twice for these expenses.” *Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC*, 291 Mich App 403, 406–07; 804 NW2d 898 (2011) citation and quotation marks omitted. The CLA is to be liberally construed. *Id.*

Here, the parties do not dispute that Partridge Creek owns the real Property or that Tenant does not have title to the Property. The parties also appear to accept that Tenant entered into the agreement with ASI Equipment for the installation of the equipment. See, e.g., ASI Equipment Exhibit 3, Supplemental Affidavit of Bruno Fuciarelli ¶2.

Rather, the question now before the Court is whether ASI Equipment’s lien attaches to the real Property owned by Partridge Creek or only to the improvement—the equipment designed, supplied and installed on behalf of Tenant.

According to the express terms of MCL 570.1107(1), generally a contractor who contracts with a lessee would only have a construction lien on the interest of the lessee. MCL 570.1107(1). Where the party contracting for the improvement has no legal title to the real property, the lien attaches only to the improvement. See again, MCL 570.1107(3). "This is because Michigan's mechanics' lien act allows a lien to the extent of the interest of the owner, part owner, or lessee with whom the claimant lienor has contracted." *J & I Serv Station, Inc v Wash Wagon of Michigan, Inc*, 120 Mich App 533, 537; 327 NW2d 518 (1982) citation and quotation marks omitted.

However, Courts recognize an exception to the general rule. When the lessee acts on behalf of an owner of real property, and thereby as the owner's agent, a "landlord may be bound by a lien for a tenant's improvements if the improvements are required by the lease." *Id.* More specifically, "[b]y requiring the lessee to make the improvements, the lessor has appointed the lessee as an agent." *Id.* citing *Rowen & Blair Electric Co v Flushing Operating Corp*, 399 Mich 593, 250 NW2d 481 (1977).

The *J&I Serv Station, Inc.* Court concluded that a "landlord who permits but does not require improvements has not created a principal-agent relationship with the tenant." *Id.* citing *Sewell v Nu Markets, Inc*, 353 Mich 553, 558-559, 91 NW2d 861 (1958); see also, *Rowen*, 399 Mich at 602 (No agency where improvements are merely permitted). The *Rowen* Court additionally stated, "[t]he possibility of the owner's unjust enrichment through circumvention of the lien statute must exist. *Rowen*, 399 Mich at 601 (Holding that the alterations had no value to the owner where plaintiff set up bakery equipment later seized or repossessed). "An implied agency must be *an agency in fact*; found to be so by reasonable deductions, drawn from *disclosed facts or circumstances*. *AFP*

Specialties, Inc v Vereyken, 303 Mich App 497, 507; 844 NW2d 470 (2014) citation omitted.

In the present case, on November 21, 2018, the Court previously denied ASI Equipment's motion for summary disposition in order to permit factual development on the question of whether Partridge Creek required Tenant to make the improvements to the Property. ASI Equipment stated that it did not have a copy of the Lease between Tenant and Partridge Creek and based on a sentence in a previous *Opinion and Order*, believed the Lease required the improvements.

Now ASI Equipment has a copy of the Lease which it relies on exclusively to support an alleged agency or implied agency relationship between Tenant and Partridge Creek. ASI Equipment cites to Section 6.01 and 6.02 of the Lease for the Property. ASI Equipment's Exhibit 2. Section 6.01 of the Lease prohibits Tenant from making "alterations, additions, improvements to the Premises without the prior written approval of Landlord." Section 6.02 requires all alterations, decorations, additions and improvements by Tenant "be deemed to have attached to the Premises and to have become the Property of Landlord upon such attachment." Section 6.02 further prohibits Tenant from removing any alteration other than trade fixtures, equipment and personal property "installed by Tenant and not affixed to the Premises . . ." ¹

Yet ASI Equipment cites no Lease provision where Partridge Creek required the installation of the equipment. Section 6.01 of the Lease requires permission from the

¹ Partridge Creek's hearsay argument regarding the Lease attached to ASI Equipment's Response lacks merit. A trial court may consider substantively admissible evidence, even if not in admissible form. *Barnard Mfg Co, Inc v Gates Performance Engg, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009)(Party did not have to lay a foundation for invoices on a motion for summary disposition).

Landlord for improvements but does not require Tenant to make the improvements. See again, *J & I Serv Station, Inc*, 120 Mich App at 536–37 (Landlord who permits improvements does not create a principal-agent relationship with the tenant).

While the parties have attached a number of impressive photographs of the equipment installed along with copies of previously issued opinions relating to the restaurant, ASI Equipment still presented no evidence to support the existence of an agency relationship between Tenant and Partridge Creek.

When responding to a motion for summary disposition, “an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4). Here the parties do not dispute that Tenant contracted with ASI Equipment. Partridge Creek denies the existence of an agency relationship with Tenant regarding the improvements. Therefore, the burden falls to ASI Equipment to supply factual support for such a relationship. Since ASI Equipment provided no evidence to raise a question of material fact on the agency issue, the Court must grant summary disposition in Partridge Creek’s favor.

ASI Equipment raised two other arguments but neither has merit. First, ASI Equipment reads MCL 570.1107(3) to mean that even if the lien attached to the improvement initially, once Tenant abandoned the property, the lien then attached to Partridge Creek’s real Property. However, nothing in MCL 570.1107(3) supports expanding the scope of the lien. The statute simply provides, “The forfeiture, surrender, or termination of any title or interest held by . . . lessee who contracted for an improvement to the property . . . does not defeat the lien . . . upon the improvement.”

Simply, even if Tenant abandoned the improvement, the lien would remain in place on the improvement.

ASI Equipment also argues that the doctrine of judicial estoppel bars Partridge Creek from now disclaiming the lien since it previously sought eviction of Tenant in part based on the existence of the lien. “Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479–80; 822 NW2d 239 (2012). The doctrine preserves the integrity of the courts by “preventing a party from abusing the judicial process through cynical gamesmanship.” *Id.* citation omitted. A “party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.” *Id.*

Here, ASI Equipment has not shown Partridge Creek takes a contrary position from one previously asserted because it has not shown that the parties previously litigated the validity of the lien or that Partridge Creek ever unequivocally asserted the enforceability of the lien. Instead, Partridge Creek merely argued that Tenant breached a Lease condition because a lien had been filed. The Court sees no abuse of the judicial process or gamesmanship there.

Finally, the parties in this litigation repeatedly and understandably focused on the trade-fixture doctrine and the question of lien enforcement in the context of permanent versus removable equipment. On the one hand, if a fixture is removable, how can it be an improvement to real property? On the other hand, if a fixture becomes annexed to real property, how can the lien only be enforced against the fixture/interest of the

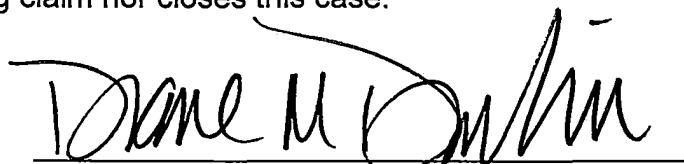
lessor? How the trade fixture doctrine relates to the CLA is unclear and the parties cited no authority addressing any tension that may exist between the two.

However, the CLA does not approach lien enforceability from the standpoint of the improvement—whether it is permanent or removable. The CLA makes no mention of permanence but instead focuses on property interest. The CLA broadly defines improvement to include even non-tangible labor, planning and management in relation to property. The Court here follows the focus of the CLA, which is on the property interest of the party contracting for the improvement. The law is clear in that regard. An owner of real property cannot be held to answer for a lien when that owner did not contract for the improvement either directly or indirectly by agency. Since no evidence in the record supports Partridge Creek's contracting for the equipment, the Court will grant Partridge Creek's motion for summary disposition.

V. Conclusion

For the reasons set forth above, Partridge Creek's motion for summary disposition on Count I is GRANTED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.


Hon. Diane M. Druzinski, Circuit Court Judge

Date: **APR 24 2019**

DMD/ac

cc: Cindy Rhodes Victor, Esq.
Edward S. Toth, Esq.
David J. Lee, Esq.