



Chairman: Patrick J. Keating

Editor: Russell M. Paquette
Wayne State University Law School
Detroit, Michigan

August 27, 1976

A Letter from the Chairman:

My term as the second Chairman of our Section ends with the annual meeting of the State Bar next month. I am proud to report that under the tutelage of Norm Gilmore, our first Chairman, and with the continued assistance of the Council, our Section is now the second largest of all Sections of the Bar.

Prior to the formation of our Section, there did not exist any open bar-related group charged with serving the interest of the profession in relation to real property law. The task of forming an organization that would effectively keep an eye on developing legislation, assist in formulating new approaches to the practice, and effectively aid in informing and educating the lawyers of the State in real property law was formidable and challenging. Within the past year the Section has co-sponsored seminars on Foreclosure of Mortgages and Land Contracts, the new Title Standards, and the Development and Financing of Commercial Real Estate. The preparation and presentation of the subject matter of these seminars was completely a project of your section. Projects under consideration include standardization of forms, mini-seminars on areas of current interest, and the development of an annual seminar at only nominal cost to section members. The Council also continues to work to assure the continued excellence of the Newsletter.

The Section is fortunate to have Ralph Jossman as its next Chairman. Ralph's entire professional career has been devoted to Real Property Law and he served for years as a Vice President of Lawyers Title. Ralph is writing each of you to encourage your participation on one of the Section committees and I urge you to become involved.

The only sad note of the past year was the sudden and untimely death of Frank Sengstock, editor of our Newsletter. Frank, who held a doctorate in law from the University of Michigan and was a professor of law at the University of Detroit, brought a unique scholarship and devotion to the Newsletter that will be difficult to replace. His passing is a particular loss to those of us who worked with Frank and knew him for the great guy he was.

Should you attend the State Bar Annual meeting, please try to make our Section meeting on Thursday, September 16, at 9:00 A.M. in the Hunt Room at the Raleigh House.

Sincerely,

/s/ Patrick J. Keating

PJK:jn

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WHITHER GOETH THE MECHANIC'S LIEN?

This issue of the NEWSLETTER is primarily devoted to a phase of real property law which perhaps has been the source of more uncertainty, contradictory and confusing decisions, and wasted effort, than any other single statutory procedure, not excepting foreclosures by advertisement. Pat Keating, our present Section Chairman, and a real expert on lien law, has been kind enough to analyze and synopsize the present law and its operation. A copy of that also is attached to this Newsletter so that the reader may use it in perusing this article and the court opinions which follow:

The complexities and uncertainties of the Mechanics Lien Act (MCLA 570.1 et seq.) have been multiplied over the years by innumerable amendments that the Legislature has passed largely at the behest of special interest lobbyists. The result is a shambles. The first sentence in Section 1 of the Act, that which sets forth what are and which are not lienable items, is two pages long! This is typical.

The chief difficulty, as a result, lies not in enforcement of a lien but in what is lienable in the first place, and whom its provisions protect. It also carefully defines the steps necessary to impose such a lien. It repeatedly has been stated by the courts that the rules for obtaining a lien, being in derogation of the common law, must be construed strictly. This is mentioned, for instance, in the Michigan Appeals Court opinion in Spartan Asphalt Paving Co., attached to this Newsletter, a decision to which reference will be made later here. The important thing, though, is that it has become more and more difficult for lawyers to have any assurance that the claims of liens they have prepared and filed are valid and enforceable. For a tradesman to claim a lien without the help of a lawyer is just impossible.

Presently the matter has reached what may be fairly termed a crisis stage. The courts have come forth with a rash of conflicting and ambiguous decisions which simply cannot be reconciled with each other. Some courts, in Michigan and in other states, have held the Act, or one similar to it, unconstitutional as a whole under the theory of Fuentes and Northrip. (See the Bulletin on Maryland law attached). Others have reached an opposite conclusion. Two such opinions in direct opposition are Commercial Capital Investment Company, in Delta County, Michigan, which holds the Act unconstitutional, and one in Genesee County, Williams and Works, Inc., which definitely holds it to be constitutional. Both opinions are set forth in their entirety in this Newsletter.

The strict construction doctrine led logically, although perhaps not reasonably, to the Michigan Court of Appeals affirmance of the trial court recently in Hodgkiss & Douma, Inc. v. Woodward Development Company, et al., holding that the construction of the parking area of a shopping center is not a lienable item - because paving of a parking area is not mentioned among the myriad lienable items listed in Section 1 of the Act - although foundations, wharves, sidewalks, and other appurtenances to a structure, together with any machinery leased or used by the contractor and any engineering plans or surveys for installation of roads, streets, highways and sidewalks (and presumably parking areas) are expressly included in this Section as a basis for a lien. In Kent County, on the contrary, a summary judgment recently was refused a defendant on the plaintiff's claim of lien for the furnishing of completely personal property, none of which could have been encompassed in the Act as it exists under any possible interpretation. Other Courts have held "substantial" compliance with the Act to be sufficient.

The ultimate, however, seems to have been reached in the recent decision of the Michigan Court of Appeals, in Burton Drywall, Inc. v. Kaufman, et al where it was held, with one dissent, that the provision in Section 1 of the Act requires that a Notice of Intention to Claim a Lien must be served by a general contractor on the "owner, part owner or lessee" with whom he made his contract. Case law to the contrary began with Lamont v. LeFevre in 1893, 96 Mich. 175, and has been upheld and cited as the law by the Michigan Supreme Court ever since, in other cases, such as Mielis v. Everts (1933) 264 Mich. 363, and Wallich Lumber Co. v. Gold, 365 Mich. 323, 1965. The new decision directly reverses the former Supreme Court decisions, and states that they are utterly mistaken and entirely wrong. If this decision is upheld by the Supreme Court, it would invalidate thousands of liens presently under foreclosure or which have been foreclosed in all the years since 1929 when the language dealing with this requirement of the law was amended. To the knowledge of this writer no lawyer has ever before believed that such a notice was of any benefit whatever to a person who had first hand knowledge of his contractual obligations in dealing directly with his contractor. For this reason the above cited cases have never been really questioned. On the other hand, if the Act is interpreted strictly, there is no exception for general contractors, and the Court of Appeals is right.

There are many other points which could be raised here, such as the rather odd notice and recording requirements of the Act, and several matters of priorities and waivers, but we feel that we have expressed enough to show the great need for a complete overhaul of the Mechanic's Lien Law in Michigan. Contractors and material men do need protection, especially the smaller subcontractors, and there can be very little argument about that. The present law, however, causes more confusion than it gives help and its complexities render it impossible for the smaller tradesman to use the Lien Law at all. Read the attached decisions and see if you don't agree. The Michigan Law Review Commission and your Real Property Law Section are exploring curative measures but we need all the help we can get. If any of you have any suggestions please communicate with our Chairman-Elect, Ralph Jossman, 792 Neff Road, Grosse Pointe, Michigan 48230.

In the meantime, all we can suggest is that you follow the Act as it's written, and use the interpretation of it which best suits your facts and position.

G. Norman Gilmore
Past Chairman

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OUTLINE OF MECHANIC'S LIEN LAW IN MICHIGAN

The continued escalation of development and building costs has caused a renewed and continuing interest in Mechanic's Lien law. Improved technology has greatly increased the speed of construction and similarly has greatly increased the amount of money that can be involved in a Mechanic's Lien; yet in times past there has been very little reason nor opportunity for the practicing attorney to become reasonably expert in the handling of these claims. All of these factors, compounded together provide ample reason for this outline. It should be noted that this is not an attempt to exhaustively treat this subject matter but rather to provide an outline of the salient points in the perfection and enforcement of Mechanic's Liens. Perhaps the outline itself will suggest other problems or questions and, if so, the editors would appreciate hearing from you.

I. HISTORICAL BACKGROUND:

Mechanic's Liens have always been with us in the State of Michigan; the first Mechanic's Lien law of Michigan was adopted by the legislative council of the territory of Michigan and approved March 31, 1827. In 1838, the Mechanic's Lien law was part of the first revised statutes of the state and in 1891 the present statute was adopted. This statute has been amended 15 times and constitutes the present Mechanic's Lien law of our state. Unfortunately, since these amendments were the result of efforts by groups with special narrow interests seeking to enhance the groups' positions by the amendment, the statute has become unnecessarily complex and when, considered with some of the antiquated procedures which have remained with the Act, has become unnecessarily complex and is certainly a prime prospect for a complete overhaul. Unfortunately, attempts to completely overhaul the Mechanic's Lien statute have again been directed by groups with narrow special interests which conflict with other groups with narrow special interests in such a manner as to stifle any completely objective, satisfactory reform. The matter is now being studied by the Law Revision Commission so hope remains that there still exists a chance for progress in reform.

The Mechanic's Lien law is remedial in nature, is in derogation of the common law, and finds its origin solely in the statute. Peninsular Electric Co. v. Norris, 100 Mich 496. The doctrine upon which such liens are founded is that those who perform work or furnish material which enters into and enhances the value of improvements on real estate are entitled to a preferred claim against and lien upon the specific property involved. The value of the real estate is presumed to be enhanced by the improvement so that attaching creditors and mortgagees are not prejudiced. McClintic-Marshall Co. v. Ford Motor Co., 254 Mich 305. The effect of the lien law is to create a species of the statute mortgage whether the contract is written or unwritten, even though the owner may not have intended to charge his estate. Kirkwood v. Hoxie, 95 Mich 62.

II. WHO IS ENTITLED TO A MECHANIC'S LIEN?

The list of those who would be entitled to a Mechanic's Lien is set forth in the first paragraph of §1 of the Mechanic's Lien (MSA 26.281, MCLA 570.1). Unfortunately, the amendments to this particular section of the Act have rendered that first paragraph nearly incomprehensible. However, it is obvious that the statute includes work done on a parcel of land in addition to merely modifications in houses, buildings and structures as did the prior statute; and the amendments over the years to the first paragraph, the notice of intent itself and the definitions at the end of §1 indicate that it is clear that the legislature intended that the Mechanic's Lien law include general improvements. If a lien claimant cannot find that his type

of work is not included in the first paragraph by specific language, he should resort back to the theory expressed in McClintic-Marshall Co. v. Ford Motor Co. supra. that those who perform work or furnish materials which enhance the value of real estate should be entitled to a Mechanic's Lien and contend therefore that, all of the other requirements being met, he should be entitled to his Mechanic's Lien.

III. HOW TO PERFECT A LIEN

A. If you do not deal directly with the owner.

1. The Notice of Intent:

(a) Why required.

A subcontractor, material man or laborer who does not deal directly with the owner must serve a Notice of Intention to Claim a Lien within 90 days after furnishing the first of such material or performing the first of such labor or services. This requirement is expressed in the last half of the first paragraph of Section 1 of the statute and the form of such Notice of Intention is set out in the second paragraph. The purpose of this Notice of Intention is to give the owner notice of the fact that a party with whom he has not directly contracted is furnishing labor or material and in this manner the owner may be protected against being compelled to pay for the same labor or material a second time. Saginaw Lumber Co. v. Stirling, 305 Mich 473.

(b) How to Prepare and Serve.

The form of a Notice of Intention to Claim a Lien is set out in Section 1 of the statute. The owner may be served personally or by certified mail, return receipt requested, the owner, if he is personally served, must be served within the county where the premises are situated. The statute provides that if neither the owner or his agent can be personally served within the county where the premises are located, and the claimant is unable to serve by certified mail, return receipt requested, he may serve the Notice of Intention by posting same on the premises within five (5) days after it might have been personally served. This gives a claimant up to ninety-five (95) days after the first delivery to serve by posting where the owner cannot be otherwise served. You should remember that the requirements of ninety (90) days means precisely what it says and should not be equated with three months. The five days for posting should follow the ninety day period.

(c) Labor provision.

In the event more than ninety days has expired from the first furnishing, the claimant might still have a lien solely as to labor if he furnishes his Notice of Intention to the owner before the contractor gives the owner the contractor's statement under oath required by Section 4 of the Act. In most instances, where a party furnishes labor and materials, the labor costs far exceed that of the material and this provision, which is set forth in

the third paragraph of the first section can be a lifesaver in a proper instance. It is important to note that the claimant must be able to separate on his record the charges for work as distinguished from those of labor.

(d) Proof of Service of Notice of Intent.

The statute requires that Proof of Service of the Notice of Intention shall be attached to the Statement of Account and Claim of Lien when the Statement is recorded with the Register of Deeds; failure to do so will invalidate the lien. The recommended procedure is to attach both a copy of the Notice of Intention and the Proof of Service thereof to the Statement of Account and Claim of Lien when recorded in accordance with Section 5 of the Act.

2. The Lien (Statement of Account and Claim of Lien).

(a) Why required.

Since the lien claimant is not dealing directly with the owner, the Notice of Intent has served the purpose of telling the owner that the claimant is furnishing labor and/or materials. The lien must now be made a matter of record and properly served so that it might attach to the property and serve as notice to all.

(b) How to prepare, record and serve.

1. Preparation.

The form for a statement of account and claim of lien is set out in Section 5 of the statute. While dates, legal descriptions and amount due should be fully accurate, errors do not void the lien in the absence of prejudice to one seeking to set aside the lien. Knowlton v. Gibbon, 210 Mich 547, as to dates; Grand River Lumber v. Glenn, 234 Mich 310 as to description; Scheibner v. Cahnen, 108 Mich 165. But bad faith by including non-lienable items in the lien can invalidate it, Equitable Trust Co. v. Detroit Golf & Recreation Co., 360 Mich 606; and the lien is invalid as to unnamed owners F. M. Sibley Lumber Co. v. American Built Homes, Inc., 314 Mich 60.

2. Recording.

The statement of account and claims of lien must be recorded with the Register of Deeds within ninety (90) days from last delivery. Section 5. Remember also that Proof of Service of the Notice of Intent must be attached; see III A(1) (d) above.

3. Service.

Section 6 of the Act requires personal service of the lien within ten (10) days of recording if the owner or his agent in charge of the premises can be found within the County where the property is located. If the owner or agent cannot be personally served within the county where the property is located, then service can be made by posting on the premises

within five (5) days after the expiration of the ten (10) day period. Note that service cannot be made by certified mail.

Proof of service must be recorded before an action can be taken to foreclose.

B. If you deal directly with the owner.

If you deal directly with the owner then obviously there is no reason to give an owner a Notice of Intention to claim a lien, since he already knows the claimant is supplying materials and/or labor and is unpaid. You would therefore follow the steps outlined in III A(2) above.

IV. FORECLOSURE

A. Foreclosure is by Verified Complaint and foreclosure and matters pertinent thereto are covered in Sections 10 through 28 of the statute and are easily read and comprehensible. The procedure is akin to mortgage to mortgage foreclosure, but there are some salient features as follows:

1. The Court may order a part of the premises sold if it can be satisfactorily separated and sold to satisfy all claims. Section 15.
2. The land may be redeemed at any time within fifteen (15) months from the filing of the Complaint and the judgment must either provide for this or state, as the case may be, that more than fifteen months has expired since the filing of the Complaint to Foreclose. Section 19.
3. The existence of the lien does not bar an action on the contract. You can perfect your lien, sue on the contract and, if the claim is not fully adjudicated proceed to foreclose on the lien within a year from recording. Section 22.
4. There is a provision permitting enforcement of claims not yet due, Section 26, and liens are assignable at any time. Section 25.

B. Priorities and Duration.

Section 9 deals with duration and priorities and the following should be understood:

1. The Complaint must be filed within one (1) year after recording. Maschmegen v. Haas, 376 Mich 289.
2. All valid Mechanic's Liens, regardless of when filed are considered to have attached at the commencement of construction.
3. Mortgages which are recorded after construction begins are junior to all valid Mechanic's Liens arising from the construction regardless of the dates of delivery or performance of the labor or materials. Section 9.

4. Mortgages which are recorded before construction begins are superior to liens recorded thereafter at least to the extent of the funds advanced prior to commencement of construction. There is no authority holding that a mortgage has priority when it is recorded before commencement of construction but funds are not advanced until after. It is the written opinion that a mortgage has priority when it is recorded prior to commencement of construction and where the mortgage obligates the mortgagee to deliver funds; if the mortgagee is not so obligated then the mortgage has priority only to the extent of funds paid prior to the commencement of construction.

V. OTHER POINTS YOU MUST CONSIDER

- A. Where the land is held by husband and wife jointly, a lien can attach only if the improvements are pursuant to contract in writing signed by both husband and wife. Section 2; Wallich Lumber Co. v. Gold, 375 Mich 323.
- B. Where the contracting party has no legal title and construction is for the erection of a new building, the lien claimant has a lien on the structure. Section 3. Also, where the lien claimant can be subrogated to the rights of the land contract vendee where the vendee surrenders or forfeits his rights. Section 3.
- C. The five day rule; Section 8. A lien claimant must furnish an owner with a written statement of the amount of work and materials furnished to date and then unpaid within five days from demand under penalty of forfeiture of the lien. Munroe v. Scherer, 215 Mich 26. This demand however must be made before the Complaint to Foreclose is filed. Munroe v. Scherer, 215 Mich 26.

V. PROTECTION FOR THE OWNER

- A. A contractor who deals directly with the owner must, before he is entitled to any payment, deliver to the owner a statement under oath (known as a Contractor's Sworn Statement) listing every subcontractor or laborer in his employ, and of every person furnishing materials, and stating the amount due or to become due them for the labor and/or materials furnished. The contractor can have no lien until this is done. Section 4. A contractor may rely on this sworn statement except where he has information to the contrary.
- B. An owner may discharge a lien by filing a bond in a penal sum of twice the amount of the lien; Section 7, and upon payment of a lien is entitled to a discharge of lien. Section 23.

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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

SPARTAN ASPHALT PAVING CO., a
Michigan corporation,

Plaintiff-Appellant,

MARCH 25, 1976

v

No. 23288

TRI-CITIES CONSTRUCTION, INC., a
Michigan corporation,

and

U. S. REALTY INVESTMENTS, an
Unincorporated Association,

Defendants,

and

UNION LAKE ASSOCIATES, a co-partnership,
and WOODWARD DEVELOPMENT CO., a
Michigan corporation,

Defendants-Appellees.

Before: Danhof, P.J.; and V. J. Brennan and M. J. Kelly, JJ.

Per Curiam.

Plaintiff appeals of right from summary judgment in favor of defendants in a suit to foreclose a mechanic's lien on property owned by the defendants.

Plaintiff brought action in Genesee County. The complaint alleged that the owners, Union Lake Associates and Woodward Development Co., had entered into a contract with Tri-Cities Construction, Inc., to construct a shopping center and that plaintiff began furnishing asphalt materials and labor on June 12, 1973. On July 10, 1973, plaintiff served the owners with a notice of intent to claim a lien. The last of materials and labor was furnished on August 20, 1973, and on September 12, 1973, plaintiff recorded a statement of account and lien.

Seven days later plaintiff caused the statement of account and lien to be served upon the owner by posting a true copy on the premises owned by defendants Union Lake Associates in Fenton. On March 21, 1974, plaintiff recorded a copy of the proof of service and a true copy of the statement of account and lien with the Genesee County Register of Deeds.

Defendants moved for summary judgment on the ground that plaintiff had not complied with MCLA 570.6; MSA 26.286. In an opinion dated July 19, 1974, the trial court held that the statute mandated strict compliance and that plaintiff had failed to comply with the posting provisions, which was deemed fatal to the attachment of the lien.

MCLA 570.6; MSA 26.286 provides in pertinent part:

"Every person recording such statement or account as provided in the preceding section, except those persons contracting or dealing directly with the owner, part owner or lessee of such premises shall within 10 days after the recording thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county or in case of his absence from the county, on his agent having charge of such premises, within the county wherein the property is situated, a copy of such statement or claim; but if neither of such persons can be found within the county where such premises are situated, then such copy shall be served by posting in some conspicuous place on said premises within 5 days after the same might have been served personally, could the principal or agent, as aforesaid, have been found. * * *"

The issue raised for our consideration is framed in the trial court's opinion:

"The statute provides that the party recording the statement of lien shall serve the owner or other appropriate party personally within the first 10 days after such recording. If the recording party is then unable to personally serve the owner or other appropriate party within the county, the recording party is allotted 5 more days in which to post a copy of the statement on the premises.

"The undisputed facts of the present case is that plaintiff sought to fulfill the statute by posting the copy of the statement 7 days after the recording.

"The case law points out that the above statute must be strictly complied with."

We agree and affirm. In Vorrath v Garrelts, 35 Mich App 463, 465-466; 192 NW2d 547 (1971), this Court set forth the applicable rule:

"'Strict' not 'substantial' compliance is the rule of construction concerning the question of whether or not a lien attaches."

"In Burman v Ewald, 192 Mich 293, 295 (1916), the Court said:"

"'The statute providing for a mechanic's lien, being in derogation of the common law, must be strictly construed to the point when the lien attaches; that thereafter, because of its remedial character, a liberal construction may be indulged.' (Emphasis supplied.)"

See also Wallich Lumber Co. v Gold, 375 Mich 323; 134 NW2d 722 (1965), Lowrie & Webb Lumber Co. v Ferguson, 312 Mich 331; 20 NW2d 209 (1945), Grand River Lumber & Coal Co. v Glenn, 234 Mich 310; 207 NW 855 (1926).

The plaintiff urges us to reverse the grant of summary judgment on the authority of Hurd v Meyer, 259 Mich 190; 242 NW 822 (1932). In that case the property upon

which a lien was claimed was located in Oakland County and defendant resided in Wayne County. A brief recitation of facts is set forth at p. 195 of the opinion:

"Upon being credibly informed that the owners did not reside in Oakland County, plaintiff's agent posted the claim of lien upon the premises. Personal service was not made upon the owners. There is testimony fairly indicating that Mr. Meyer during the time the building was in the process of construction usually visited the place each Saturday, and that Mrs. Meyer went to the property once in every 2 or 3 days."

As in the instant case, defendant resided in a county other than the one in which the property was located. There was testimony indicating that defendant could be found at various times in Oakland County, yet the Court held that upon being "credibly informed" that the owner did not reside in Oakland County, the posting complied with the statute.

We decline to apply the holding of Hurd to this case because the facts in Hurd do not indicate that the posting took place during the first ten days. We presume the contrary; that is, that the posting took place within the exact mandate of the statute, "within five days after the same might have been served personally".

For the first time on appeal, plaintiff submits the affidavit of the process server which states that "he was advised that the owners of the premises were located somewhere in the Detroit area, not within the county, and he was further advised that work on the project had been stopped." Thereafter, he went to the job site which appeared to be abandoned and at that time posted the notice. Ex Parte affidavits, filed for the first time in the appellate brief, may not serve to enlarge the record on appeal. People v Nelson Johnson, 58 Mich App 473, 493; 228 NW2d 429 (1975), People v Taylor, 383 Mich 338, 362; 175 NW2d 715 (1970).

However we do not believe that the facts asserted in the affidavit would require us to reach a different result. Quite the contrary -- we would reach the same result. This is an historically highly technical area of creditor's rights and real estate law and we are unwilling to inject a substantial compliance ruling. We readily admit that the plaintiff in this case could be said to have substantially complied with the statute. We are unable to say, however, that it strictly complied.

Judgment affirmed. Costs to appellees.

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FOR IMMEDIATE RELEASE

LIENS - COURT OF APPEALS HOLDS MARYLAND LIEN LAW
UNCONSTITUTIONAL

The digest set forth below is being sent as an insert because of its importance and the fact that our 5th issue was substantially ready to mail before this decision came down.

The Court of Appeals of Maryland on February 10, 1976, in the case of Barry Properties, Inc. v. Fick Bros. Roofing Company (Case No. 62) HELD MOST KEY PROVISIONS OF THE MARYLAND MECHANIC'S LIEN LAWS TO BE INVALID. This was the first of several lower court decisions to reach the Court of Appeals.

The basis of the attack on the law was that the imposition of a lien without notice and an opportunity for a prior hearing (as authorized by the Maryland statute) deprives the owner of his property without due process. The Court emphasized the fact that the lien kept the owner from being paid the balance of its construction loan (since the construction lender withheld payments pending resolution of the lien claims) and also prevented the owner from either closing the payment loan or obtaining a second mortgage on the equity in the property.

The Court of Appeals felt that it was bound by the Fuentes and North Georgia Finishing line of cases. It rejected the Supreme Court's affirmance of the three Judge District Court holding in Arizona in the Spielman-Fond case as not being directly apposite because of differences in the statutes of the two states. The Maryland Court said:

"Although Fuentes, it seemed, was substantially undercut by Mitchell, Mitchell, in turn, was limited and Fuentes was resuscitated, at least to some extent, by North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), the Supreme Court's most recent opinion dealing with prejudgment creditor remedies and due process."

"What we glean from Sniadach, Fuentes, Mitchell and North Georgia Finishing is that, lacking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior probable-cause-type hearing are, as held in Fuentes, unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in Mitchell and North Georgia Finishing are present and even then, although this is less clear, the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized. See generally, Catz & Robinson. Due Process and Creditor's Remedies From Sniadach and Fuentes To Mitchell, North Georgia and Beyond. 28 Rutgers L. Rev. 541 (1975); 63 Geo. L.J. 1337 (1975).

As already indicated, a Maryland mechanic's lien is a statutory prejudgment creditor remedy which at least temporarily deprives the owner of a significant property interest. The lien is created as soon as work is performed or materials are supplied, with no requirement of prior notice to the owner. When the claimant is a subcontractor, as is the appellee here, it must, within 90 days of furnishing labor or materials, provide the owner with notice of an intent to make a lien claim. A subcontractor may file his claim with the clerk of the court before he provides the owner with notice of intent to claim a lien, Accrocco v. Fort Wash. Lumber, 255 Md. 682, 684, 259 A.2d 60 (1969), or the subcontractor may not actually file the lien for as long as 180 days after he gave notice of intent to do so. Consequently, notice of intent to claim a lien, which is the only 'notice' the owner is required to receive prior to being made aware of a suit to enforce the claim, is not, in our judgment, adequate. The filing of a claim to a lien, although recorded, also does not give the property owner constructive notice of the lien. See Wm. Penn Supply v. Watterson, 218 Md. 291, 298. 146 A.2d 420 (1958). There is no provision requiring any hearing concerning the lien prior to the filing of a suit to enforce it. The statute is the

same with respect to general contractors, except that they need not even provide the notice of intent to claim a lien. In short, the Maryland mechanic's lien law permits an owner to be deprived of a significant property interest without notice or a prior hearing, and thus is unconstitutional unless it provides protections such as those discussed in Mitchell and North Georgia Finishing or it is deemed to be within the 'extraordinary circumstances' exception."

. . . .

"We conclude, therefore, that, because it allows prejudgment seizures without notice, a prior hearing or other sufficient safeguards, and cannot be justified under the extraordinary circumstances exception, Maryland's mechanic's lien law is incompatible with the due process clauses of Article 23 and the Fourteenth Amendment."

N.B. The decision should be read carefully inasmuch as it invalidates only part of the statute and may be confusing in a given instance. We have also been advised that counsel will seek to have the case reheard by the Maryland Court of Appeals and may consider taking the matter to the Supreme Court.

NATIONAL PROPERTY LAW DIGEST

* * * * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF DELTA

-----)
COMMONWEALTH CAPITAL INVESTMENT CORPORATION,))
a Massachusetts corporation,))
))
Plaintiff,))
))
vs-)	FILE NO. 75-2845-CH
))
THE INN GROUP, INC., a Michigan corporation,))
et al,))
))
Defendants.))
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OPINION ON MECHANIC'S LIEN STATUTE

Plaintiff lending corporation commenced an action for foreclosure of mortgage against defendant, Inn Group, Inc., and named as parties defendant those persons claiming Mechanic's Liens.

Defendant Leehold, Inc. filed a Motion for Accelerated Judgment against the lienholders claiming the Mechanic's Lien Law constitutes a taking of property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and Article One, Section Seventeen of the Constitution of the State of Michigan.

The thrust of defendant's claim of unconstitutionality is aimed at MCLA 570.9 which provides that upon accrual of the lien, the lien shall continue for a period of one year after the statement of account, and lien is recorded and no longer, unless proceedings have begun to enforce it.

It is generally recognized that a lien is a property right and a propriety interest in the property rather than a mere matter of procedure. 51 Am Jur 2d 144.

"A lien is not a collateral contract. It is a right or claim against some interest in property created by law as an incident of the contract." *Cheff vs. Haan*, 269 Mich 598 (1934).

"The doctrine of equitable lien is a rule of substantive law, grounded on equitable principles which recognizes or declares a security interest --- even though such security interest is imperfect and may be given only limited priority where the rights of third parties have intervened." *Warren Tool Co. vs. Stephenson*, 11 Mich App 274, 288 (1968).

While it has been said that a lien is not a property right but is merely an incumbrance upon the property, it is in fact a conditional right to have the property sold to satisfy a debt. There can be little doubt that such conditional right restrains the free alienability of the owner and interferes with the dominion of the master over the fee simple.

From this, we conclude that the imposition of a lien constitutes a "taking of property".

We further conclude that the action of the State in permitting the recording of the lien is sufficient activity on the part of the State to bring the matter under the purview of the Fourteenth Amendment. *Reitman vs. Mulkey*, 387 US 369, 87 S Ct 1627, 18 L Ed 2d 830 (1967); *Garner vs. Tri-State Development Co.*, 382 F Sup 377 (1974).

The United States Supreme Court recently has made it clear that the action of a legislature in creating a creditor's right in the property of a debtor must be accompanied by a timely opportunity to have the creditor's rights heard on the merit. The burden of instituting the action must be on the creditor claiming the right, rather than on the debtor. *Fuentes vs. Shevin*, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983 (1972); *North Georgia Finishing, Inc., vs. Di-Chem., Inc.*, 419 US 601, 95 S Ct 719, 42 L Ed 2d 751 (1975); *Cochrane vs. Westwood Grocery Co.*, 394 Mich 164 (1975).

While this Court does not see any difficulty from a constitutional standpoint of the imposition of the lien in the first instance, the failure to provide for a hearing in which the validity of the claim could be determined, but instead allowing the lien to restrain the free alienability of the property for the period of one year constitutes a taking of property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.

This Court holds that Section MCLA 570.9 is unconstitutional. The Court sua sponte treats the Motion for Accelerated Judgment under Rule 116 as a Motion for Summary Judgment under Rule 117.2(1).

Defendant, Leehold, Inc., may prepare a Judgment.

Dated: June 7, 1976

/s/ Clair J. Hoehn
Clair J. Hoehn, Circuit Judge
(P15025)

* * * * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

WILLIAMS & WORKS, INC.

Plaintiff

vs.

SPRINGFIELD CORPORATION, et al,

Defendants.

JUDGE ELLIOTT

NO. 74-30853-CH

FINDINGS AND

CONCLUSIONS

1. Williams & Works, Inc., a civil engineering firm, contracted with Springfield Corporation to provide, and did provide, survey work, soil borings and design plans for streets, sewers and other facilities in a 26 apartment building project west of Flint known as "Bristol Square". Such work and services were "improvements" as that term is defined in the last paragraph of section 1 of the Mechanic's Lien Statute, MCLA 570.1.

Those "improvements" were commenced before the mortgage, now held by Kelly Mortgage and Investment Co., was given or recorded. All mechanic's liens are "preferred" and have priority over the mortgage. In MCLA 570.9 paragraph "Third", the word "improvement" must be given the meaning as defined in MCLA 570.1.

2. Springfield Corporation was at all pertinent times both "owner" and "original contractor" as those terms are used in the statute. Springfield was owner as optionee, title holder and finally general partner of Bristol Square Properties Group. Although owner, it also acted as the original contractor. General contracting was its business. It performed the full function of a general contractor on this project including the giving of the statements required in MCLA 570.4 It was treated as general contractor by Kelly Mortgage and Investment Company, the mortgagee, by Burton Abstract and Title Company, Kelly's escrow agent and title insurer, and by Bristol Square Properties Group, the limited partnership that came into the picture after Springfield got into financial difficulty.

Consequently, Williams & Works and other subcontractors did not have to give sworn statements. And, because Springfield was also owner with actual notice of improvements by subcontractors and material men, lien claimants were not required to give the notice of intent to claim lien described in MCLA 570.1.

3. Each lien claimant was required to comply with MCLA 570.5 and record its statement or account "within 90 days from the date on which the last of the materials shall have been furnished or the last of the labor or the last of the designing, engineering or surveying services shall have been performed***". We find that three lien claimants have failed to prove compliance with this requirement.

Whitson Insulation made no serious effort to prove that its last performance or furnishing was within 90 days.

Westinghouse Electric Corp claimed that it sent trim worth \$5.32 including postage within 90 days. There was no proof the trim was ordered, needed or received. It appears to be a ruse to get around the 90 day time limit.

Fessler and Bowman's superintendent picked up cement forms, in late April, that had been left on flatwork laid in March because of a decision in March to do nothing more unless paid. The pickup was not labor performed in the cement work improvements. The 90 days began in March and had expired before July 22nd when the statement of account and lien was recorded.

4. Although there was sometimes a failure of exact compliance with the service or posting provisions of MCLA 570.6, each lien claimant substantially complied with those statutory provisions. Substantial compliance is sufficient. Moreover, compliance with this section is not required because all remaining lien claimants contracted and dealt directly with the owner and so MCLA 570.6 does not apply to any of them.

5. Some have added interest, service or finance charges to the unpaid balances owed to them. We find no authority in the statute or contracts for such additions and they must be excluded from the amounts of lien adjudged.

6. Williams & Works and PPG did not sign waivers of liens. All of the other claimants, who recorded a statement or account within 90 days of the last performance or furnishing, did sign one or more waivers. They are Blink Lumber Company, Garno Brothers Heating and Cooling, Inc., Genesee Cement, Inc., Northern Construction Company and Shank Coupland & Long Company. Much of the trial was concerned with the effect of these waivers. They must be considered in the light of all of the evidence and circumstances.

The procedure for part-payment draws was described in Kelly's letter to Blink Lumber on July 27, 1973 (Blink exhibit 53) which said, in part:

"All disbursements are subject to our approved inspection, the architects approved inspection, the builders sworn statement and supporting waivers of lien and the builders certified invoice for request of payment. Our disbursements are made by Burton Abstract and Title Company in conjunction with the title policies for these projects."

Burton supplied Springfield with the waiver of lien forms. Springfield always used the same white form it sent with its checks with a note "Please sign and return". The form has a blank space for the dollar amount paid by Springfield upon each periodic draw. Often Springfield filled in the amount of the check on the enclosed form, but sometimes the subcontractor or material man filled in the amount. However, it was left blank on three of five waivers signed by Garno Brothers. All subs and suppliers signed in a widespread belief that they were waiving only their potential lien rights as to the work or supplies for which they were being paid by

that particular periodic draw. In fact, Genesee Cement wrote "paid in full through 12-31-73" and "paid in full through 1-31-74" upon the two waivers that it signed, to clarify its intent.

The form and the way it was used were both deceptive. It says that the signer waives "any and all claims or right of lien which the undersigned now have or may have hereafter", but it contains the blank space for the amount paid. The form contains nothing to warn a signer that he is waiving future lien rights for work or materials which had not been furnished yet. The form was used with each draw payment although such a form had already been signed by a sub or supplier.

Springfield, Burton and Kelly did nothing in reliance upon the waivers as full and complete, past and future waivers. A Burton employee says he took less care to see that a waiver was received if a waiver had been received earlier but that is not reliance consideration.

We find that the waivers of lien signed by Blink Lumber Company, Genesee Cement, Inc., Northern Construction Co., Shank Coupland and Long Co. and even Garno Brothers Heating and Cooling, Inc. (whose waivers were sometimes blank as to amount) were intended to be waivers only of the performance or supplies paid for by the check which accompanied the waiver form. To consider them otherwise would defeat just claims without consideration, reward deceptive practices and encourage sloppy supervision of large, long-term construction projects.

Consequently, we conclude that the waivers signed by these claimants do not defeat their claims.

7. Because some lien claims have finance or interest additions to be eliminated and because the questions of validity of liens and priority of liens were separated from other questions, some care must be taken to prepare the several final judgments as to the issues decided herein. The Court will be available for further consideration of the form of the judgments, on motion, if need be.

8. We find that Blink does not have "equitable priority". However, since it has "piggy-back" priority resulting from the engineering and surveying before the mortgage, the point is unimportant.

9. Finally, we find and conclude that the Mechanic's Lien Statute is constitutional. Some such law has been a part of the building of this state for 150 years, providing a just and necessary security to the construction industry. Rights acquired in good faith in reliance of such security should not be wiped out by new and vague judicial notions of due process. Moreover, there are differences between mechanic's liens and the procedures for garnishment, repossessions and other remedies which have recently been seen to need revision. Cases upholding mechanic's lien statutes include Spielman-Fond vs Hanson's, Inc., (Ariz 1973), 379 F. Supp. 997, aff'd mem. 4 17 US 901 (1974). Its similarity, reasoning and affirmance by the U.S. Supreme Court is persuasive.

September 15, 1975

/s/ Philip C. Elliott
Philip C. Elliott
Circuit Judge

* * * * *

STATE OF MICHIGAN
COURT OF APPEALS

HODGKISS & DOUMA, INC.,
a Michigan Corporation,

Plaintiff-Appellant,

JULY 21, 1976

v

No. 25895

WOODWARD DEVELOPMENT COMPANY,
a Michigan Corporation; UNION LAKE
ASSOCIATES, a partnership consisting
of E. David Auer, Jack J. Surnow, and
Roy J. McGlothlin; and TRUSTEES OF
CITIZENS MORTGAGE INVESTMENT, a
Massachusetts business trust,

Defendants-Appellees,

Before: R. J. Danhof, P.J., and D. E. Holbrook and D. L. Munro, JJ.

D. E. HOLBROOK, J.

This case deals with the interpretation of Michigan's complex and confusing mechanic's lien law, MCLA 570.1; MSA 26.281. The question presented is whether the construction of a parking lot or parking area is a lienable item or covered under the statute. The plaintiff, Hodgkiss & Douma, Inc., instituted this suit for foreclosure of a mechanic's lien on a shopping center owned by the defendants. Plaintiff had constructed the parking area for the shopping center but apparently had no involvement with the construction of any of its buildings. After commencement of the action, the defendants moved for summary judgment on several grounds. Arguments on the motion were heard and a decision rendered on August 19, 1975. The trial judge ruled that the mechanic's lien statute did not apply to parking lots and related areas. Accordingly, the defendants' motion for summary judgment was granted. The plaintiff was granted leave to amend his complaint to assert a cause of action against defendants on a contract theory.¹ Plaintiff appeals.

¹Plaintiff raises the issue of whether the contract cause of action had been stated in the original complaint for the first time at oral arguments on this appeal. The issue was not briefed. We decline to consider this "new issue". It does appear that the trial judge in his order granted plaintiff's motion to assert a cause of action on a contract theory provided that such amended complaint was filed within 30 days from the date of the judge's opinion, August 19, 1975. This plaintiff failed to do. This contract cause of action is not properly before this Court and will not be considered.

The trial judge held Bezold v Beach Development Co., 259 M 693; 244 NW 204 (1932), to be controlling in the present case. Bezold expressly had held that the mechanic's lien statute "would not include general improvements, roadways or parking grounds." 259 Mich at 695; 244 NW at _____. Appellant contends that Bezold is no longer controlling because the mechanic's lien statute has been amended several times since this case was decided. We agree with the appellant that the legislature has deemed it advisable in certain instances to extend the statute to include structures wholly dissimilar in character from those specifically enumerated in the lien law of the 1930's. However, we disagree with appellant as to the legal effect of such legislative action or inaction as it applies to the applicability of the statute to parking lots or parking areas.

The mechanic's lien statute is strictly construed in determining whether a lien attaches. However, once a lien is deemed to have attached, a liberal construction of the statute is given in order to fulfill its remedial character. J. Altman Companies, Inc. v Saginaw Plumbing & Heating Supply Co., 42 Mich App 747; 202 NW2d 707 (1972), Eastern Construction Co. v Cole, 52 Mich App 346; 217 NW2d 108 (1974). Thus, a distinction is drawn between the construction of the statute for purposes of attachment and enforcement. Altman, supra. The statute, as it existed at the time Bezold was decided, read:

"Every person who shall, in pursuance of any contract, expressed or implied, written or unwritten, existing between himself as contractor, and the owner, part owner or lessee of any interest in real estate, build, alter, improve, repair, erect, ornament or put in, or who shall furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any house, building, machinery, wharf or structure, or who shall excavate, or build in whole, or in part, any foundation, cellar or basement for any such house, building, structure, or wharf, or shall build or repair any sidewalks or wells or shall furnish any materials therefor, * * * shall have a lien * * *." (Emphasis supplied.)

Plaintiff again makes the argument that a parking area also serves as a sidewalk. However, the Court in Bezold apparently disapproved of such statutory construction. We feel such argument is controlled by Bezold. The present statute MCLA 570.1; MSA 26.281, although expanded considerably in its coverage, still does not expressly include parking areas. Plaintiff contends that the 1958 amendment to the statute provides for a lien for the construction of parking areas through the doctrine of ejusdem generis.

The rule of statutory construction known as "ejusdem generis" is the rule whereby legislative intent is derived from a statute in which general words follow a designation of particular subjects. The meaning of the general words will ordinarily be construed as restricted by the particular designation as including only things of the same kind, class, character or nature as though specifically enumerated. Healy v Toles, 266 Mich 584; 254 NW 213 (1934), People v Smith, 393 Mich 432; 225 NW2d 165 (1975). The 1958 amendment reads:

"[S]urvey or plat any lot or parcel of land, or portion thereof, or engineer and/or design any sewers, water lines, roads, streets, highways, sidewalks, or prepare and furnish pursuant to such contract to such owner, part owner or lessee of any interest in real estate any survey, plat, plat of survey or design and/or engineering plan, or plans, for the improvement of any lot or parcel of land * * *."

There is no general term here, however, to which the principal of ejusdem generis can be applied. The amendment only pertains to surveying, engineering and designing services. Accordingly, the legislative intent to apply the statute to the construction of parking areas cannot be derived from this amendment.

Plaintiff also contends that the 1963 amendment provides for a lien for parking lots or parking areas. However, the 1963 amendment provided for liens for the renting and leasing of equipment to be used in connection with the land. Therefore, this amendment is inapplicable to the instant case. Other amendments to the statute include expansion of protection of this statute to nursery stock, to swimming pools, to engineering or designing sewers, sewage disposal systems, water lines, streets, sidewalks, etc. All these expansions of the statute have been to specific types of construction items. Therefore, it is difficult to ascertain the legislative intent to expand coverage beyond the specific items enumerated. See, Healy, supra.

The Maryland Court of Appeals in Freeform Pools, Inc. v Strawbridge Home for Boys, Inc., 228 Md 297; 179 A2d 683; 95 ALR2d 1365 (1962), was similarly asked to extend its state's mechanic's lien statute to swimming pools. The Court declined to do so through statutory interpretation and noted as follows:

"While it is true that under the mechanic's lien law, supra, §32, [Code (1957), Article 63, §1] the law is remedial and under the decisions of this Court is to be construed in the most liberal and comprehensive manner in favor of mechanics and material men, Reisterstown Lumber Co. v Reeder, 224 Md 499, 507; 168 A2d 385, and cases there cited, Courts have no power to extend it to cases, beyond the obvious designs and plain requirements of the statute. Basshor v Baltimore & O R R Co., 65 Md 99, 103; 3 A 285. A mechanic's lien is a claim created by statute and is obtainable only if the requirements of the statute are complied with. Adkins & Douglas Co. v Webb, 160 Md 571; 154 A 259, and cases collected in 15 MLE, Mechanic's Liens, §§ 1, 2, and 3.

* * *

"It is significant that throughout the legislative history of the mechanic's lien law in Maryland the law has been repeatedly amended to include specific lienable structures. For example, more recently a mechanic's lien has been made applicable to grading, landscaping, nursery products, shrubs, and wells. This clearly indicates that the Legislature has never intended that the law be stretched to include within its scope structures which were not clearly within the definition of the items included. If swimming pools are to be lienable it is for the Legislature to specifically include them and not for the courts to extend the provisions of the mechanic's lien law by judicial interpretation." 228 Md at ____; 179 A2d at ____; 95 ALR2d at 1369 and 1370.

Although we feel that there is a valid policy argument for the extension of the protection of the mechanic's lien law to contractors who provide parking lots, grading and blacktopping and other similar commercial necessities, we feel that the proper forum for such argument is in the legislature and not in the courts. The Supreme Court's decision in Bezold has not been changed by statutory amendments or by judicial decision. It remains the law.

Affirmed. No costs, the construction of a statute being involved.

* * * * *

STATE OF MICHIGAN
COURT OF APPEALS

BURTON DRYWALL, INC.,
a Michigan Corporation,

Plaintiff-Appellant,

v

No. 19113

HARRY KAUFMAN, BEN KAUFMAN, d/b/a
WESTLAND PARK APARTMENTS, a Michigan
co-partnership, KAUFMAN BROTHERS IN-
VESTMENT COMPANY, and CITIZENS MORTGAGE
CORPORATION,

Defendants-Appellees

and JOSEPH RICKARD, et al,

Defendants.

Before: Bashara, P.J., and R. B. Burns, and Quinn, JJ.

Bashara, P.J.

Plaintiff appeals a summary judgment granted to the defendants in an action to foreclose a mechanic's lien.

The defendant, Westland Park Apartments was a partnership formed for the purpose of developing an apartment complex. The partners were the defendants Harry Kaufman, Ben Kaufman, and Joseph Rickard. The partnership entered into an agreement with Ricco, Inc. to act as general contractor on the project. The president and sole shareholder of Ricco, Inc. was Jack Rickard.

Ricco, Inc. subcontracted with the plaintiff to provide drywall materials and labor to the project. Plaintiff's lien states that it began furnishing materials and/or labor to the construction site on January 12, 1971. The proof of service for the notice of intent to claim a lien discloses that the notice was served on the partnership on June 2, 1971, some 141 days after the work began.

The trial judge granted summary judgment on the ground that plaintiff failed to state a claim upon which relief could be granted. GCR 1963, 117.2(1). He ruled that no mechanic's lien attached because the plaintiff failed to serve a notice of intent to claim a lien within 90 days of first furnishing the materials or labor.

Plaintiff contends that notice is not required where the party seeking the lien deals directly with the owner. The argument is that the plaintiff contracted with Ricco, Inc. Jack Rickard is an officer and sole shareholder of Ricco, Inc. as well as a partner in Westland Park Apartments. Rickard's knowledge of plaintiff's claim is binding on the partners and partnership.

The Mechanic's Liens Act, MCLA 570.1 et seq; MSA 26.281 et seq, is in derogation of the common law and must be strictly construed to the point when the lien attaches. Thereafter, it may be liberally construed to fulfill the remedial objectives of the act. Smalley v Northwestern Terra-Cotta Co., 113 Mich 141, 148; 71 NW 466 (1897), Burman v Ewald, 192 Mich 293; 158 NW 853 (1916).

Section 1 of the Mechanic's Liens Act requires, inter alia, that the party seeking the lien serve the owner with a written notice of intent to claim a lien against a building for any amounts unpaid on material or labor furnished to that building. Such notice must be served within 90 days after furnishing the first of such materials or labor.¹ MCLA 570.1; MSA 26.281, Georgia-Pacific Corp v Central Park North Co., 394 Mich 59, 64-65; 228 NW2d 380 (1975).

However, there is a judicially created exception that one need not serve a notice of intent to claim a lien, where the lien claimant is dealing with the owner and not a contractor. Mielis v Everts, 264 Mich 363, 364; 249 NW2d 875 (1933). Since Mielis, no case law has examined the authority for such an exception, although subsequent cases have explained its rationale.

In Wallich Lumber Co. v Gold, 375 Mich 323; 134 NW2d 722 (1965), the Court considered the priorities between a mechanic's lien and a mortgage. The mechanic's lien was found to have priority. The Mielis exception was inapplicable to the fact situation in Wallich and was only discussed to bolster the result. In obiter dictum the Court stated that notice was not required where the lien claimant deals directly with owner, because the owner knows there is a claim against him. Wallich Lumber Co. v Gold, supra p 328.

In J. Altman Companies, Inc. v Saginaw Plumbing and Heating Supply Co., 42 Mich App 747; 202 NW2d 707 (1972),² the Mielis exception was again considered and its rationale approved. However, the Court found that Mielis did not apply because the lien claimant did not deal directly with the owner or general contractor, which for the purposes of argument were considered one entity.

We are of the opinion that Mielis³ was erroneously decided. Without explanation it made the following statement:

"It is first claimed that the lien of Albert Mielis is invalid because notice of intention to claim a lien was not served upon the owners. It was not necessary. The lien claimants were dealing with the part-owner, not with a contractor. 3 Comp. Laws 1929, §13101; Smalley v Ashland Brown-Stone Co., 114 Mich 104 [72 NW 29 1897]." Mielis v Everts, supra at 364.

Mielis' reliance on Smalley v Ashland Brown-Stone Co., supra, was misplaced. That case interpreted the notice of intent to claim a lien requirement of section 1 of the Mechanic's Liens Act of 1891 PA 179, §1, as amended by 1893 PA 199. The Smalley Court found that the notice was for protection of the subcontractor, material man, or laborer to preserve its claim against the owner, and as such, was not a condition precedent to the lien attaching.

However, it apparently escaped the attention of the Mielis Court that section 1 of the Mechanic's Liens Act was amended by 1929 PA 264 to add the following:

"No person shall have a right to claim a lien as in this act provided, unless and until he shall have served a notice as in this section provided, and proof of

the service of such notice shall be attached to the verified statement or account when filed with the registrar of deeds as provided in section five of this act." (Emphasis supplied.)⁴

Webster v Cooper Development Co. 266 Mich 505, 507; 254 NW 186 (1934), construed this provision to require compliance with the notice provisions of the act as a condition precedent to the acquisition of a mechanic's lien. To the extent that Smalley v Ashland Brown-Stone Co., supra, held otherwise it was overruled sub silentio by Webster. Therefore, the Mielis exception is grounded on authority no longer of precedential value.

The Court of Appeals is not bound to await a decision of the Michigan Supreme Court in overruling a rule of law, if it is convinced by overwhelming authority that the Supreme Court would overrule that authority were it deciding the question. Duncan v Beres, 15 Mich App 318; 166 NW2d 678 (1968), Abendschein v Farrell, 11 Mich App 662, 680-684; 162 NW2d 165 (Levin dissenting, 1968), affirmed 382 Mich 510; 170 NW2d 137 (1969).

We believe that were Mielis examined today by the Supreme Court, it would be overruled for the following reasons. First, the amendment of 1929 PA 264 apparently escaped the attention of the Mielis court. That amendment clearly requires compliance with the notice provisions before a lien can attach. Webster v Cooper Development Co., supra. Second, Mielis failed to strictly construe the act by erroneously following obsolete law, and inadvertently judicially legislating an exception to the notice requirements. For these reasons we decline to follow Mielis.

Plaintiff's final argument is that unless the defendant can demonstrate prejudice by plaintiff's delay of 141 days in serving defendant with notice of intent to claim a lien, the plaintiff should not be deprived of lien rights. We reject this contention. We hold that a strict construction of the act requires that as a condition precedent to the attachment of a lien, the lien claimant must serve notice of intent to claim a lien on the owner within 90 days of first furnishing material or performing labor. MCLA 570.1; MSA 28.281. Webster v Cooper Development Co., supra.

Affirmed.

F O O T N O T E S

¹The purpose of the notice is to inform the owner of the existence of claims against the property by subcontractors, material men, or laborers who have contracted with the original contractor. Theoretically, once informed the owner will not pay the original contractor until the lien claimants have been discharged. This procedure protects the owner from having to pay twice. Lamont v LeFevre, 96 Mich 175, 177; 55 NW 687 (1893), Hartwick Lumber Co. v Chonoski, 216 Mich 424, 428; 185 NW 774 (1921), Saginaw Lumber Co. v Stirling, 305 Mich 473, 478; 9 NW2d 680 (1943).

²To the extent that J. Altman Companies, Inc. v Saginaw Plumbing and Heating Supply Co., 42 Mich App 747, 751 202 NW2d 707 (1972), indicates that Saginaw Lumber Co. v Stirling, supra fn 1 creates a knowledge exception to the notice requirement of MCLA 570.1; MSA 26.281, we disagree. In that case, a notice of intent to claim a lien was sent by registered mail addressed to the husband and wife owners of the property in question. They claimed the lien was invalid because the notice only

named the husband. The evidence showed that the notice was read by both the husband and wife. The Supreme Court held that under these circumstances there had been "substantial compliance" with the act. Saginaw Lumber Co. v Stirling, supra at p 479. This case merely defined compliance with the act. It did not create an exception to the notice of intent requirement.

³The only other case that has cited Mielis v Everts, 264 Mich 363; 249 NW 875 (1933), is Sadler v Winshall, 373 Mich 378, 383; 129 NW2d 384 (1964), which was concerned with the requirements for service of a statement of lien. MCLA 570.6; MSA 26.286. Sadler apparently confused service of a statement of lien with service of a notice of intent to claim a lien.

⁴This section is the same today except that "recorded" was substituted for "filed" by 1958 PA 213.

* * * * *

STATE OF MICHIGAN
COURT OF APPEALS

BURTON DRYWALL, INC.,
a Michigan corporation,

Plaintiff-Appellant,

v

No. 19113

HARRY KAUFMAN, BEN KAUFMAN,
d/b/a WESTLAND PARK APARTMENTS,
a Michigan co-partnership, KAUFMAN
BROTHERS INVESTMENT COMPANY, and
CITIZENS MORTGAGE CORPORATION,

Defendants-Appellees,

and

JOSEPH RICKARD, et al,

Defendants.

Before: Bashara, P.J., and R. B. Burns and Quinn, JJ.

R. B. BURNS, J. (dissenting)

Reluctantly, I must dissent. In my opinion we are bound by Mielis v Everts, 264 Mich 363; 249 NW2d 875 (1933). Mielis has not been overruled, but has been acknowledged in Wallich Lumber Co. v Gold, 375 Mich 323; 134 NW2d 722 (1965) and Altman, Inc. v Saginaw Plumbing, 42 Mich App 747; 202 NW2d 707 (1972).

I do not think it appropriate for an intermediate Court to decide cases contrary to established precedent of the Supreme Court.

* * * * *

THE ALL IS NOT DULL DEPARTMENT

Your Chairman recently received a call from a lawyer with a new problem. The lawyer represented a land contract vendor. The husband and wife vendees divorced and the wife was awarded the vendees interest. The wife later ceased making payments and the lawyer began proceedings to forfeit the contract and recover possession. At this point the vendee-wife called the lawyer, advised she didn't want the property and would "sign-off". The lawyer prepared and forwarded the deed back to the vendor naming as grantee the vendee-wife as "a single woman". The lawyer then received a call from the vendee-wife advising that she couldn't sign the deed. "Why not?" asked the lawyer. "Because since my divorce, I've had a sex-change operation, I am now a man, and have now remarried and have a wife!!"

The lawyer's question: Does the new wife have a dower interest in the real estate?

Since the property was not a homestead and dower does not attach to the interest of a land contract vendee the answer was simple here. However, how would you solve the problem if the instrument were a mortgage instead of a land contract? And would it be further complicated if the ex-husband were still liable on the mortgage?

Your Chairman solicits your comments on this delicate problem; such comments should be directed to Chairman-Elect Jossman who, after September 17th will, among his other duties, be in charge of sex problems of the Section. Your Chairman is sad to report that the Title Standards Committee, whose members are all over 40 years of age, has no sex specialist.

* * * * *