STATE OF MICHIGAN

COURT OF APPEALS

MID-MICHIGAN CONCRETE CONTRACTORS, L.L.C.,

Plaintiff/Counter-Defendant/Cross-Defendant,

V

SONRISE HOMES, INC., WISE CONSTRUCTION COMPANY, JAMES LUMBER COMPANY, RANDAZZO MECHANICAL HEATING & COOLING, INC., UNIVERSAL FOREST PRODUCTS EASTERN DIVISION, INC., FIFTH THIRD BANK, NATHANIEL BRAZWELL and KENYETTA BRAZWELL,

Defendants/Counter-Defendants/Cross-Defendants,

and

TODD FUHR, DAWN FUHR, CLARENCE MCELROY, ROBBI A. YOUNG and ROBERT D. YOUNG,

Defendants/Counter-Defendants/Cross- Defendants-Appellees,

and

GENESEE ELECTRIC, INC.,

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

and

UNPUBLISHED
February 24, 2011

No. 294305
Genesee Circuit Court
LC No. 06-084974-CK;
07-085897-CH

ROBERT REEVES, CYNTHIA REEVES, TERESA SEVO, THOMAS W. JACKSON, ELLA L. JACKSON, GERALDINE SWIECICKI, JOHN TALLIEU, DAVID JOHN KENNEDY, ELIZABETH KENNEDY, DONALD CHAPIN, LAURIE CHAPIN and ELIZABETH TALLIEU,

Third-Party Defendants-Appellees,

and

WILLIAM HANSON, ANTHONY HANSON, MICHAEL THOMAS, JACK THOMAS, CLIFFS OF GRAND BLANC, L.L.C., CROSS CREEK CONDOMINIUMS, L.L.C., RIVERSIDE NORTH 1 PROPERTIES, L.L.C., JACQUELINE HANSON, SCOTT SOBOL, SANTHI MEKALA, KISHORE PEDAVALLI and WELLS FARGO BANK,

Third-Party Defendants.

Before: SAAD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Genesee Electric appeals as of right from the trial court's order dismissing its lien claims under the Construction Lien Act (CLA), MCL 570.1101 *et seq*. Because proof of service of the recorded construction lien is subject to the substantial compliance test of MCL 570.1302(1), we vacate the order and remand to the trial court for further proceedings.

On appeal, Genesee Electric argues that the trial court erred in dismissing its lien claims because of Genesee Electric's failure to attach proofs of service of claims of lien to its complaint, as required by MCL 570.1111(5). Genesee Electric argues that, under MCL 570.1302(1), "substantial compliance" with MCL 570.1111(5) is sufficient, and that Genesee Electric substantially complied. We review issues of statutory construction de novo as questions of law. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

The CLA, MCL 570.1111(5), requires a party recording a claim of lien to serve a copy of the claim of lien on the designee,[1] and to attach proof of making the service to the complaint, cross-claim, or counterclaim. It provides:

> (5) Each contractor, subcontractor, supplier, laborer, or agent of a group of laborers authorized under subsection (6) recording a claim of lien, within 15 days after the date of the recording, shall serve on the designee personally or by certified mail, return receipt requested, at the address shown on the notice of commencement, a copy of the claim of lien and a copy of any proof of service recorded in connection with the claim of lien. If a designee has not been named in the notice of commencement, or if the designee has died, service shall be made upon the owner or lessee named in the notice of commencement. If the service is made by certified mail, service is complete upon mailing. Proof of making the service shall be attached to any complaint, cross-claim, or counterclaim filed to enforce a construction lien.

In this case, it was discovered during an evidentiary hearing held ten months after the filing of Genesee Electric's "Counter/Cross/Third-Party Complaint," that Genesee Electric had failed to attach the required proofs of service to its complaint. The trial court permitted Genesee Electric to search its records for the proofs of service, but Genesee Electric was unable to locate them. Instead, it offered newly-executed proofs of serving copies of the claims of lien. After a hearing on the effect of the failure to attach the proofs of service, the trial court ruled that the omission required it dismiss Genesee Electric's claims of lien. It also denied Genesee Electric's motion to file an amended complaint in order to attach the newly-executed proofs of service.

On this record, we agree with Genesee Electric that the trial court erred in dismissing the complaint. MCL 570.1302(1) provides a rule of statutory interpretation specific to the CLA:

> This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

Whether substantial compliance suffices with respect to a particular requirement of the CLA requires an analysis on a case-by-case basis. *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc*, 461 Mich 316, 321-322; 603 NW2d 257 (1999).

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[1] "'Designee' means the person named by an owner or lessee to receive, on behalf of the owner or lessee, all notices or other instruments required to be furnished under this act. The owner or lessee may name himself or herself as designee. The owner or lessee may not name the contractor as designee. However, a contractor who is providing only architectural or engineering services may be named as designee." MCL 570.1104(2).

The courts of this state have held that several specific provisions of the CLA are subject to a "substantial compliance" analysis. In *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 121-124; 560 NW2d 43 (1997), the Michigan Supreme Court rejected the defendant property owner's argument that the failure of the plaintiff subcontractor to provide its notice of furnishing within the 20-day time frame required by MCL 570.1109(1) defeated the subcontractor's lien. MCL 570.1109(1) provides that a subcontractor "shall" provide a notice of furnishing within 20 days of furnishing the first labor or material. Under MCL 570.1109(6), however, a subcontractor's failure to provide a notice of furnishing within the 20-day period does not defeat its right to a construction lien, though it will reduce the lien by any amount the owner paid for the work before the subcontractor provided the notice, provided that the payments were made pursuant to a contractor's sworn statement or a waiver of lien. MCL 570.1109(6); *Vugterveen*, 454 Mich at 123. The *Vugterveen* Court held that the subcontractor's meeting with the property owner "removed any need" for the property owner to provide a notice of furnishing because the subcontractor provided all of the information contained in a notice of furnishing during the meeting: the identity of the contractor, the work to be performed, and the property to be improved. *Id*. at 130-131. The Court concluded that the trial court did not err in concluding that the subcontractor had substantially complied with the CLA and that, under the circumstances, the subcontractor's failure to provide a notice of furnishing was not a defense to the lien. *Id*. at 131.

In addition, this Court held in *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 510; 667 NW2d 379 (2003), that the plaintiff substantially complied with the notice requirement of MCL 570.1110(8), now MCL 570.1110(9),[2] by providing unverified statements to the title company during construction and a verified sworn statement to the defendants before the summary disposition hearing. It reasoned that an unsworn statement still serves the notice purpose of the statement by giving the owner notice of the identity of the subcontractors and the amount owed to each. *Id*. In *Advanta Nat'l Bank v McClarty*, 257 Mich App 113; 667 NW2d 880 (2003), this Court held that only substantial compliance with MCL 570.1117(4) (requiring each person with an interest in the real property involved in an action for the enforcement of a construction lien through foreclosure to be made a party to the action) was required, and that a lumber supplier substantially complied by giving notice to all known or recorded interests. *Id*. at 120-121. And in *Big L Corp v Courtland Constr Co*, 278 Mich App 438; 750 NW2d 628 (2008)[3], this Court held that the defendant substantially complied with MCL 570.1110(4)

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[2] MCL 570.1110(9) provides:

> If a contractor fails to provide a sworn statement to the owner or lessee before recording the contractor's claim of lien, the contractor's construction lien is not invalid. However, the contractor is not entitled to any payment, and a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien, until the sworn statement has been provided.

[3] The Michigan Supreme Court vacated the part of the judgment that relied on *Vugterveen*, 454 Mich at 121, instead of MCL 570.1302(1), for the applicable rule of statutory interpretation, but

(providing a form for a sworn statement) because all of its "statements were fully compliant with the form outlined in MCL 570.1110(4) . . . except that they were not sworn to before a notary." *Id*. at 443.

In *Northern Concrete Pipe*, 461 Mich 316, however, the Michigan Supreme Court held that substantial compliance does not suffice with respect to the requirement in MCL 570.1111(1) that a lien must be filed within 90 days after the last date when materials or services are supplied. It reasoned that:

> Absent strict compliance with the ninety-day filing requirement of MCL 570.1111(1), every construction project could create a potential cloud on the title to property, creating uncertainty in land titles. Moreover, where property owners and subsequent purchasers rely on the clear and unambiguous requirements of MCL 570.1111(1), and find no notice of lien filed with the county office of the register of deeds, it would be inequitable to later subject those parties to the risk of foreclosure. [*Id*. at 322.]

Our Supreme Court further explained that "[a] precise deadline is not well suited to an analysis of what constitutes 'substantial compliance.'" *Northern Concrete Pipe*, 461 Mich at 323. It contrasted this with the situation in *Vugterveen*, noting that where a requirement exists in order to put an owner on notice of the possibility of a lien, the court can ascertain whether the owner has in fact received notice. *Id*. But, as for MCL 570.1111(1), "the Legislature could not have imposed a more precise requirement." *Id*. That provision "states without qualification that a subcontractor's right to a lien ceases to exist if not recorded in the county office of the register of deeds within ninety days after the last furnishing of labor or material." *Id*. at 323-324.

Guided by this case law, we conclude that Genesee Electric has substantially complied with MCL 570.1111(5) in this case. The purpose of the proof of service requirement in the last sentence of MCL 570.1111(5) is to provide the court and litigants with an at-a-glance means of determining, once a lawsuit has been filed, whether a copy of the claim of lien has been served. Because Genesee Electric failed to attach any proofs of service to its complaint, that purpose was, at least initially, not satisfied by Genesee Electric. There is no indication, however, that appellees were prejudiced by this omission. Indeed, it was not even brought to the trial court's attention until ten months after Genesee Electric filed its complaint.

Moreover, even a failure to file a proof of service of a *pleading* or *motion* is not grounds for dismissal under the rules of civil procedure. MCR 2.107(D) requires that "Proof of service must be filed promptly and at least at or before a hearing to which the paper relates." But "[f]ailure to file proof of service does not affect the validity of the service." MCR 2.104(B). And even *improper service* is not grounds for dismissing an action "unless the service failed to inform the defendant of the action within the time provided in these rules for service." MCR 2.105(J)(3). In *People v Walker*, 234 Mich App 299, 313-314; 593 NW2d 673 (1999), this Court held that any error in the prosecutor's failure to file a proof of service of a notice of enhancement

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otherwise denied leave to appeal. Justice Corrigan dissented from the denial of leave to appeal. *Big L Corp v Courtland Constr Co*, 482 Mich 1090; 757 NW2d 852 (2008).

of sentence, as required by MCL 769.13(2), was harmless beyond a reasonable doubt. Thus, even absent an applicable rule of interpretation that permits "substantial compliance," failure to provide proofs of service as required by statute or court rule is not generally grounds for dismissal. Nor does the proof of service requirement implicate the kinds of reliance interests at stake in *Northern Concrete Pipe*, 461 Mich at 322.

In addition, Genesee Electric attempted to remedy the omission by moving to amend its complaint so that it could attach the newly-executed proofs of service. These proofs of service would fulfill, if belatedly, the purpose of the proof of service requirement by notifying the parties and the court that copies of the claims of lien were served and the date on which they were served. Genesee Electric argues on appeal that the trial court abused its discretion by refusing to permit Genesee Electric to amend its complaint.

We review a trial court's decision on a party's motion to amend a pleading for an abuse of discretion. *In re Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

"A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading." MCR 2.118(A)(1). Otherwise, "a party may amend a pleading only by leave of the court or by written consent of the adverse party," but "[l]eave shall be freely given when justice so requires." MCR 2.118(A)(2). An amended pleading supersedes the former pleading unless otherwise indicated. MCR 2.118(A)(4).

Although the standard of review is abuse of discretion, *In re Kostin*, 278 Mich App at 51,

> [m]otions to amend should be denied only for specific reasons such as "'[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility. . . .' "The trial court should specifically state its reason for denying a motion to amend on the record. [*Franchino v Franchino*, 263 Mich App 172, 189-190; 687 NW2d 620 (2004) (internal citations omitted).]

No such specific reason existed here. Allowing an amendment would not result in undue delay, particularly because Genesee Electric had already prepared proofs of service and submitted them to the trial court. Nor is there any indication that permitting the amendment would unduly prejudice appellees. And, importantly, the trial court failed to articulate any reason for denying the motion to amend distinct from its general ruling that the failure to attach the proofs of service necessitated dismissal. It did not explain why an amendment would not cure the defect or otherwise should not be permitted. Given its ruling that strict compliance with the proof of service requirement in MCL 570.1111(5) was required, the trial court's decision to also deny the motion to amend fell outside the range of principled outcomes.

We disagree with appellees' argument that amending the complaint would be futile because filing the initial complaint without the required proofs of service did not toll the one-

year statute of limitations.[4] Appellees premise this argument on a comparison to a failure to file an affidavit of merit in a medical malpractice action. An affidavit of merit, which must be filed with a medical malpractice complaint under MCL 600.2912d, is very different than a proof of service. The affidavit of merit serves the substantive purpose of establishing, as a threshold matter, the merit of a medical malpractice claim by forcing the plaintiff to identify a potential expert witness and obtain an affidavit of that health professional attesting to such things as the applicable standard of care, an opinion that it was breached, and the manner in which the breach was the proximate cause of the alleged injury. MCL 600.2912d(1). In *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000), the Court held that, under MCL 600.2912d(1), an affidavit of merit must be filed with a medical malpractice complaint in order to toll the limitation period. The reasoning of *Scarsella* does not apply here, particularly given the CLA's substantial compliance provision. MCL 570.1302(1). Under MCR 2.118(D),[5] Genesee Electric's amended complaint would relate back to the filing of its original complaint, and the action would not be barred by the statute of limitations. Unlike affidavits of merit in the medical malpractice arena, proofs of service are not conditions precedent to the filing of a complaint under the CLA. Timely recording of the construction lien and timely filing of the complaint are the conditions precedent to the maintaining of the action. Substantial compliance analysis as provided by MCL 570.1302(1) may then be applied in furtherance of the tenants of the CLA to round out the corners of the litigation.

Appellees also claim that the proffered proofs of service were flawed because they were prepared 17 months after the fact and indicate that the copies of the claims of lien were served on October 12, 2006, the day before the claims of lien were recorded on October 13, 2006. They argue that, because of these flaws, permitting Genesee Electric to file an amended complaint would be futile. We first point out that the lateness of the preparation of the proofs of service is due at least in part to the appellees' failure to raise this issue until ten months after the filing of the complaint. Second, we observe that the October 12, 2006, date is consistent with the copies of the claims of lien that were attached to the initial complaint, which indicate that the lien claims were prepared on that date. A Genesee Electric representative also testified at the evidentiary hearing that the lien claims were prepared on October 12, 2006. We therefore disagree with appellees' suggestion that the October 12, 2006, date indicates that the proofs are of questionable reliability. Third, contrary to appellees' suggestion, there is no requirement in MCL 570.1111(5) that a *recorded* copy of the claim of lien be served on the designee. Finally, to the extent appellees suggest that the proofs of service do not comply with MCL 570.1111(5) because they do not show that service was made "within 15 days *after* the date of the recording" (emphasis added), we reiterate that, under the circumstances of this case, Genesee Electric has

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[4] "Proceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded." MCL 570.1117(1).

[5] "An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." MCR 2.118(D).

substantially complied with MCL 570.1111(5). It is undisputed that the claims of lien were in fact recorded, appellees claim no flaw in the actual service of the copies of claims of lien, and there is no indication that any prejudice to appellees would result from the filing of proofs of service dated one day before the date of recording.

Because the substantial compliance provision MCL 570.1302(1) is applicable to the proof of service requirement in MCL 570.1111(5) and Genesee Electric substantially complied, we vacate the order of the trial court and remand for further proceedings. We do not retain jurisdiction. Genesee Electric, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio