STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF ENVIRONMENTAL QUALITY and DIRECTOR OF DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs-Appellees,

V

MARD ENTERPRISES CORPORATION,

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

and

DRIESENGA & ASSOCIATES, INC.,

Third-Party Defendant/Counter Plaintiff.

UNPUBLISHED
January 18, 2011

No. 291081
Van Buren Circuit Court
LC No. 06-540769-CE

MARD ENTERPRISES CORPORATION,

Plaintiff-Appellant,

V

DANIEL SLOT,

Defendant-Appellee.

No. 291082
Van Buren Circuit Court
LC No. 06-550401-CH

MARD ENTERPRISES CORPORATION,

Plaintiff-Appellant,

V

PINE CREEK CONSTRUCTION, INC.,

No. 291083
Van Buren Circuit Court
LC No. 06-550402-CH

Defendant-Appellee.

JAMES L. MILBOCKER, INC.,

Plaintiff/Counter-Defendant,

V

No. 291084
Van Buren Circuit Court
LC No. 06-550624-CH

MARD ENTERPRISES CORPORATION and AGOSTINO J. ZOLEZZI,

Defendant/Counter-Plaintiff/Cross Defendant-Appellant,

and

INDEPENDENT BANK WEST MICHIGAN,

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

and

PINE CREEK CONSTRUCTION, INC.,

Defendant/Cross-Plaintiff/Cross Defendant,

and

HOLLANDIA GARDENS, INC.,

Defendant/Cross-Plaintiff-Appellee,

and

INFRASTRUCTURE C & E, MAGNUM EQUIPMENT COMPANY, L.L.C., LAND DEVELOPMENT SOLUTIONS, INC., KENNETH SMITH, INC., C. JOHNSON & SONS EXCAVATING, and AGGREGATE INDUSTRIES, INC.,

Defendants-Appellees,

and

DANIEL SLOT,

Defendant/Cross-Defendant,

and

STANDARD SUPPLY & LUMBER COMPANY, RHOADES MCKEE, P.C., PAMELA J. ZOLEZZI, DEPARTMENT OF ENVIRONMENTAL QUALITY, and HAYWOOD & HARRISON, P.C.,

Defendants,

and

MATTHEW GLAZER and THOMAS DIX,

Third-Party Defendants/Cross Plaintiffs.

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendant Mard Enterprises Corporation (Mard) appeals as of right in Docket No. 291081 from the trial court's April 14, 2008, order of default judgment in LC No. 06-540769-CE. In Docket No. 291082, plaintiff Mard appeals as of right from the trial court's October 20, 2008, order granting Daniel Slot summary disposition in LC No. 06-550401-CH. In Docket No. 291083, plaintiff Mard appeals as of right, challenging the trial court's April 15, 2008, order granting Pine Creek Construction, Inc.'s motion to dismiss in LC No. 06-550402-CH. In Docket No. 291084, defendants Mard and Agostino Zolezzi appeal as of right from the trial court's March 2, 2009, order determining the validity and priority of various construction liens in Docket No. 06-550-624-CH. We affirm in all cases.

I. OVERVIEW

This case involves the development of property in South Haven called Sherman Hills. Real estate developer Mard borrowed $675,000 from Independent Bank to finance construction of condominium units on the property. Contractor James L. Milbocker, Inc. (Milbocker) began construction in 2004. On December 28, 2005, Agostino Zolezzi, Mard's president, purchased units 13 through 16 in Sherman Hills in order to build a personal residence. The next day, real

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[1] *Mard v Slot*, unpublished order of the Court of Appeals, entered July 23, 2010 (Docket No. 291082).

estate developer Daniel Slot purchased units one and two. Slot hired Pine Creek Construction, Inc. (Pine Creek) to construct a duplex on his Sherman Hills property.

On January 31, 2006, the Department of Environmental Quality (DEQ) filed a complaint against Mard for environmental law violations (LC No. 06-540769-CE). On August 28, 2006, Pine Creek filed construction liens on Sherman Hills units 1 through 31. A month later, Mard brought an action against Pine Creek to void the liens (LC No. 06-550402-CH) and a separate lawsuit against Slot to foreclose on his Sherman Hills property for failure to pay Mard, his mortgagee (LC No. 06-550401-CH). In December 2006, Milbocker filed suit against Mard, in part, to foreclose on its liens (LC No. 06-550624-CH). Subsequently, various other contractors and subcontractors filed construction liens for work allegedly performed at Sherman Hills.[2] In July 2007, the trial court ordered the property into receivership. Several months later, the trial court consolidated the cases. Ultimately, the trial court dismissed all claims by Mard against Slot and Pine Creek. The receiver sold the Sherman Hills property to Lienholders, L.L.C., whose members were comprised of lien claimants in the Milbocker action, and the validity of the construction liens were decided at a subsequent trial. Appeals were filed in all four cases.

II. DOCKET NO. 291082

On December 29, 2005, Slot purchased units one and two in Sherman Hills for $225,000 and received a warranty deed. Mard financed $220,000 of the purchase price secured by a mortgage. According to the contract terms, the financed amount was due in full by June 1, 2006. In September 2006, Mard filed suit to foreclose on Slot's Sherman Hills property for failure to pay the note. Slot counterclaimed alleging breach of contract, fraud, innocent misrepresentation, rescission, unjust enrichment, and failure to provide a disclosure statement. Subsequently, Slot filed a motion for summary disposition pursuant to MCR 2.116(C)(10). He argued in part that Mard breached its warranty of title when it executed his warranty deed knowing that Independent Bank held a mortgage against the properties, a fact of which he was unaware, which entitled him to $45,000 in damages and rescission of the note and mortgage.

Mard asserted that Slot insisted on receiving a warranty deed despite having a side agreement with Zolezzi to pay $100,000 directly to the bank in exchange for release of its liens on Slot's units. The trial court granted summary disposition in favor of Slot on his counterclaim on the basis that Mard had no cause of action on its original complaint as amended and awarded Slot $45,000 plus an equitable lien on units one and two to secure the judgment. It also voided the note and mortgage and ruled that rescission of the warranty deed was moot because the property, after having been placed in receivership, was sold by the receiver.

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[2] At issue on appeal are the liens of seven contractors, Infrastructure C & E, Hollandia Gardens, Inc., Kenneth Smith, Inc., Land Development Solutions, Inc., Magnum Equipment Company, L.L.C., C. Johnson & Sons Excavating, and Aggregate Industries, Inc., who we collectively refer to in the remainder of this opinion as "the seven contractors."

Mard argues that the trial court erred in granting summary disposition in favor of Slot. We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We also review de novo a trial court's decision to rescind a contract, but its factual determinations are reviewed for clear error. MCR 2.613(C); *Alibri v Detroit/Wayne Co Stadium Auth*, 254 Mich App 545, 555; 658 NW2d 167 (2002), rev'd on other grounds 470 Mich 895 (2004).

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *AFSCME Council 25 v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Normally, the existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009).

Slot's strongest argument for summary disposition was on his breach of warranty claim (breach of contract). A title by warranty deed covenants, inter alia, that the grantor is lawfully seized of the premises, has good right to convey it, and guarantees the quiet possession of it, that it is free from all encumbrances, and that he will warrant and defend the title to the property against all lawful claims. MCL 565.151; *McCausey v Oliver*, 253 Mich App 703, 707; 660 NW2d 337 (2002). The grantor is not liable for damages until the grantee is evicted, actually or constructively, as the result of a paramount title. *McCausey*, 253 Mich App at 707-708.

Mard fully acknowledges that it issued Slot a warranty deed for his purchase of units one and two at a time when the land was encumbered by Independent Bank's mortgage. However, it asserts that Slot knew of the bank's mortgage. Mard filed no formal response to Slot's summary disposition motion. Also, while Mard's attorney mentioned Slot's purported knowledge during the motion hearing, he cited no evidence from the record to support his contention. Mard was obligated to support its position with some type of evidence, such as an affidavit. Because it failed to carry its burden of showing that a genuine issue of material facts exists, the trial court did not err in granting Slot summary disposition on this issue. *Barnard Mfg*, 285 Mich App at 377.

Mard correctly asserts on appeal that Zolezzi's affidavit, in which he averred that Slot knew of the bank's mortgage at the time he purchased units one and two, was part of the lower court record. However, even if the asserted affidavit existed in the record, albeit as an attachment to another pleading, it would not require reversal of the trial court's decision. In determining whether a factual dispute exists, the trial court may in its discretion independently search the entire record, but is only required to consider the documentary evidence identified by the parties in contesting the motion. *Barnard Mfg*, 285 Mich App at 377. Mard nor its attorney identified Zolezzi's affidavit or indicated that it had been previously filed. Thus, even though there was evidence in the record that possibly could have been used to create a factual question, the trial court was under no obligation to scour the record for this evidence. Moreover, because

the trial court did not consider the affidavit, neither should this Court. *Id*. at 381.

Mard also argues that Slot did not substantiate his claims for fraud or innocent misrepresentation. Because the trial court's ruling was dispositive of Mard's complaint and Slot's counterclaim, it did not specifically rule on each of Slot's remaining counterclaims. Regardless, Slot did not assert in his summary disposition motion that he was entitled to judgment in his favor on those claims. Mard further argues that rescission of the note, mortgage, and warranty deed was not the proper remedy because Slot did not prove that it substantially breached the contracts. However, the trial court did not rescind any of the contracts. It voided the note and mortgage and declared that rescission of the deed was moot because the receiver had sold the Sherman Hills property by the time it ruled on Slot's summary disposition motion. Thus, we need not determine if there was a material breach. Mard does not otherwise refute the awarded damages. Accordingly, we affirm that the trial court's decision granting summary disposition in favor of Slot.

III. DOCKET NO. 291083

Mard argues that the trial court erred in dismissing its claims against Pine Creek as a discovery violation sanction. MCR 2.313(A) governs motions to compel discovery. MCR 2.313(B) addresses the sanctions that are available when a party fails to comply with an order to provide discovery, which can include "striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party." MCR 2.313(B)(2)(c). In *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000), quoting *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008), this Court stated,

> The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. *Traxler* [*v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998).] The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

Factors that a trial court should consider before ordering dismissal are:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Dean*,

182 Mich App at 32-33. This list should not be considered exhaustive. *Id*. at 33. [*Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995).]

Mard argues that dismissal of its claims was improper because the trial court did not consider the necessary factors and other available sanction options on the record, which it asserts the trial court was required to do. We review de novo questions of law. *Holman v Rasak*, 486 Mich 429, 436; 785 NW2d 98 (2010). MCR 2.313(B) does not require that a court consider, or consider on the record, various factors or options before a sanction is imposed. Case law, however, states that a trial court should consider the factors listed in *Dean*, 187 Mich App 27, and consider other possible discovery sanctions "on the record," and that failure to do so constitutes error. *Kalamazoo Oil*, 242 Mich App at 86; *Thorne v Bell*, 206 Mich App 625, 634; 522 NW2d 711 (1994). Compare *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 631; 420 NW2d 835 (1987) (appellate court declined to examine record itself in favor of remand).

However, other decisions indicate that a trial court need not expressly discuss the *Dean* factors or other possible sanctions in the same portion of the record in which it orders dismissal in order to satisfy the "on the record" requirement. See *Bass*, 238 Mich App at 33-35; *Dean*, 182 Mich App at 33-34. After a review of past decisions, it appears that the prevailing view is that the "on the record" requirement can be satisfied by a review of the entire record to determine whether dismissal as a discovery sanction was warranted. Therefore, we conclude that the trial court's failure to explicitly discuss the *Dean* factors and lesser sanctions on the record at the hearing just before ordering dismissal of Mard's claims against Pine Creek does not necessarily require reversal or remand.

Mard also argues that the trial court abused its discretion in ordering dismissal because less severe sanctions would have better served the interests of justice. Mard did not respond to or challenge Pine Creek's motion to dismiss, or the trial court's order dismissing Mard's claims. As our Supreme Court has explained, in a civil case, this Court has no obligation to consider a claim of error that was not properly preserved by an objection before the trial court. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (noting that Michigan follows a raise or waive rule for appellate review in civil cases). And, on the record before us, we decline to exercise our discretion to address this claim. See *Smith v Foerster-Bloser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (stating the criteria under which this Court may overlook preservation requirements to reach an issue not properly preserved before the trial court). In any event, after our review of the entire record, including the other consolidated cases, we conclude that a miscarriage of justice would not result from considering this argument waived. Mard had a history of non-compliance and the trial court provided Mard with several opportunities to comply with discovery before resorting to the sanction of dismissal. A lesser sanction likely would have served only to continue to delay the case. Accordingly, we affirm the trial court's dismissal of Mard's claims against Pine Creek.

IV. DOCKET NO. 291084

Mard and Zolezzi raise two issues in regard to the Milbocker action. First, they argue that the trial court erred in foreclosing on the seven contractors' liens because they did not meet certain requirements of the Construction Lien Act (CLA), MCL 570.1101 *et seq.* They also argue that the trial court erred in ordering the sale of Sherman Hills units 13 through 16 without

first making Pamela Zolezzi a party to the action and addressing her dower rights. The seven contractors assert that Mard and Zolezzi lack standing to bring these claims. Whether a party has standing is a legal question that we review de novo. *Manuel v Gill*, 481 Mich 637, 642-643; 753 NW2d 48 (2008).

A. STANDING

In their briefs on appeal, the seven contractors cite the standing test set forth in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629; 684 NW2d 800 (2004), and *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001). However, at oral argument, they admitted that the proper standing test to be applied is the "limited, prudential approach" set forth in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 352-353; ___ NW2d ___ (2010). Therefore, we need not further address standing.

1. DOWER RIGHT

In regard to Pamela Zolezzi's dower right, we conclude that neither Mard nor Augostino Zolezzi have standing to assert it. The dower statute entitles a widow to a life estate in one-third of her husband's real estate that he owned at his death. MCL 558.1; *Stearns v Perrin*, 130 Mich 456, 458-459; 90 NW 297 (1902). The right is hers alone. A husband may not bargain away his wife's dower interest. *M & D Robinson v Dunitz*, 12 Mich App 5, 12; 162 NW 318 (1968). In fact, no act of a husband alone can prejudice his wife's dower right because it is entitled to protection before as well as after it has become vested. *Oades v Standard S&L Ass'n*, 257 Mich 469, 473; 241 NW 262 (1932). Consequently, only the wife can assert a claim to her dower right. No one else can assert the right for her. MCL 558.81; MCL 558.91; *Galbraith v Fleming*, 60 Mich 408, 412, 414; 27 NW 583 (1886) (assignee may not file suit in his own name where not authorized by statute). Therefore, it is clear that Mard and Zolezzi are not authorized by law to assert Pamela's dower right.

Without a legal right to raise this claim, the question becomes whether Mard or Zolezzi should nevertheless be permitted to raise it on Pamela's behalf. We have found no indication in the statutory scheme, MCL 558.1 *et seq.*, that the Legislature intended for anyone other than a wife to be able to assert her dower right. To the contrary, the statutes expressly provide that only a wife can file a claim of dower. MCL 558.81; MCL 558.91.

Mard and Zolezzi nevertheless argue that their inability to bring a claim or assert a defense in regard to Pamela's dower right is a special injury that can only be redressed by setting aside the sale of Sherman Hills. However, the sale does not need to be set aside to redress Pamela's dower right. If property is sold without release of the wife's inchoate dower right, the wife is entitled to an equitable lien on the property for which she can be compensated. The sale is not invalidated simply because the wife's dower right was not addressed. See MCL 558.7; *Slater v Edgley*, 328 Mich 589, 594; 44 NW2d 145 (1950) (wife entitled to compensation from proceeds of foreclosure sale for inchoate dower right where subsequent purchaser sold property on land contract, but bought it without a release of dower right); *Gluc v Klein*, 226 Mich 175, 197 NW 691 (1924) (plaintiff entitled to specific performance of warranty deed conveying property without wife's consent, but wife entitled to dower right in property); *Greiner v Klein*, 28 Mich 12 (1873) (private sale by husband or judicial partition sale does not extinguish dower

right where wife not made a party). Further, because the property was sold to Lienholders, only its interest would be affected should Pamela choose to bring an action in the future to assert her dower right.[3] Accordingly, we hold that neither Mard nor Zolezzi have standing to raise the issue of Pamela's dower right on her behalf.

2. CLA CLAIM

Applying the *Lansing Sch Ed Ass'n* standing test, we conclude that Mard and Zolezzi have standing to assert their CLA claim. As explained in *Lansing Sch Ed Ass'n*, 487 Mich at 355:

> The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to "ensure sincere and vigorous advocacy." Thus, the standing inquiry focuses on whether a litigant "is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." [Internal citations omitted.]

In returning to the roots of Michigan's standing doctrine, the *Lansing Sch Ed Ass'n* Court stated that, historically "'[s]tanding does not address the ultimate merits of the substantive claims of the parties.'" *Id*. at 357, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). The Court also cited *Eide v Kelsey-Hayes Co*, 431 Mich 26, 50 n 16; 427 NW2d 488 (1988) (Griffin, J.), in which standing was treated as "an inquiry that was distinct from whether the plaintiff's requested remedy was available." *Lansing Sch Ed Ass'n*, 487 Mich at 357-358.

In this case, the seven contractors' argument rests on Mard and Zolezzi's alleged inability to share in the Sherman Hills sale proceeds even if the construction liens were invalidated. However, under the applicable standing test, whether any alleged injury could be redressed by a favorable decision is not a consideration. Because Mard and Zolezzi have a cause of action regarding the liens filed against Sherman Hills, they have standing to assert this issue.

B. CLA REQUIREMENTS

Mard and Zolezzi argue that the construction liens filed by the seven contractors could not be enforced in the Milbocker action because the contractors failed to comply with the CLA's statutory requirements. We review de novo questions of statutory interpretation. *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 3; 773 NW2d 243 (2009). A trial court's factual findings are reviewed for clear error. MCR 2.613(C). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

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[3] Pamela has 25 years from the date of the units' sale to bring an action to claim her inchoate right. MCL 558.91.

This issue requires us to consider various sections of the CLA and their interplay. The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *US Fidelity Ins,* 484 Mich at 4. This task begins by examining the specific language of the statute. If it is unambiguous, it must be enforced as written. *Id*. The plain meaning of the critical word or phrase should be considered as well as its placement and purpose in the statutory scheme. *Id*. Also, statutory language should be construed reasonably, keeping in mind the purpose of the act. *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006). "[C]ontested provisions must be read in relation to the statute as a whole and work in mutual agreement." *US Fidelity Ins*, 484 Mich at 3.

The purpose of the CLA is two-fold: (1) to protect the rights of lien claimants to payment for wages and materials; and (2) to protect owners from paying twice for such services. *Old Kent Bank v Whitaker Constr Co*, 222 Mich App 436, 438-439; 566 NW2d 1 (1997). The act is remedial and is to be liberally construed to secure the purposes of the act. Substantial compliance with the provisions of the act is sufficient to establish the validity of a construction lien under the act and to give jurisdiction to the court to enforce the lien. MCL 570.1302(1); *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc*, 461 Mich 316, 320-321; 603 NW2d 257 (1999). The CLA's substantial compliance statute is applicable to part one of the act, MCL 570.1101 to MCL 570.1128. *Vugterveen Systems, Inc v Olde Millpond Corp.*, 454 Mich 119, 130-131; 560 NW2d 43 (1997); *Brown Plumbing & Heating, Inc v Homeowner Constr Lien Recovery Fund*, 442 Mich 179, 183-185; 500 NW2d 733 (1993). However, because no court has held that it is applicable to "every word of every provision within part one," *Northern Concrete Pipe*, 461 Mich at 321 n 15, whether substantial compliance with a particular provision is sufficient is determined on a case-by-case basis with consideration given to the following factors:

> the overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a "substantial compliance" clause; the interests of future litigants and the public; the extent to which a court can reasonably determine what constitutes "substantial compliance" within a particular context; and, of course, the specific language of the "substantial compliance" and other provisions of the statute. [*Id.* at 321-322.]

Yet, in determining whether there is substantial compliance, "the act's clear and unambiguous requirements should not be ignored." *Vugterveen*, 454 Mich at 121.

1. Sworn Statements

Mard and Zolezzi first challenge the sufficiency of the contractors' sworn statements. MCL 570.1110 provides:

> (1) A contractor shall provide a sworn statement to the owner or lessee in each of the following circumstances:
>
> (a) When payment is due to the contractor from the owner or lessee or when the contractor requests payment from the owner or lessee.

(b) When a demand for the sworn statement has been made by or on behalf of the owner or lessee.

(2) A subcontractor shall provide a sworn statement to the owner or lessee when a demand for the sworn statement has been made by or on behalf of the owner or lessee and, if applicable, the owner or lessee has complied with the requirements of subsection (6).

(3) A subcontractor shall provide a sworn statement to the contractor when payment is due to the subcontractor from the contractor or when the subcontractor requests payment from the contractor.

(4) A sworn statement shall list each subcontractor and supplier with whom the person issuing the sworn statement has contracted relative to the improvement to the real property. The sworn statement shall contain a list of laborers with whom the person issuing the sworn statement has contracted relative to the improvement to the real property and for whom payment for wages or fringe benefits and withholdings are due but unpaid and the itemized amount of such wages or fringe benefits and withholdings. The sworn statement shall be in substantially the following form: . . . [Exemplar form of sworn statement].

"A sworn statement notifies the owner of each subcontractor, supplier, and laborer with whom the general contractor contracted." *The Big L Corp v Courtland Constr Co*, 278 Mich App 438, 441; 750 NW2d 628 (2008), vacated in part on other grounds 482 Mich 1090 (2008). Substantial compliance with the sworn statement requirement is sufficient. *Id*. at 442.

Mard and Zolezzi contend that six of the seven contractors' sworn statements did not substantially comply with the requirements in MCL 570.1110 because all but Infrastructure's statement were prepared and signed by someone other than the contractor. There is no dispute that in early October 2008, Pine Creek's counsel prepared and Pine Creek's president, Douglas Gritter, signed the sworn statements for the contractors who assigned their liens to Pine Creek. The exemplar sworn statement in MCL 570.1110(4) includes the following sentence: "I make this statement as the (contractor) (subcontractor) or as ..... of the (contractor) (subcontractor) to represent to the owner or lessee of the property . . . ." Thus, the statute expressly contemplates that someone other than the contractor or subcontractor may have reason to provide the sworn statement. Gritter's statements provided, "I make this statement as a member of Lienholders, LLC, the assignee of the construction lien of Land Development Solutions, Inc. [name of lien claimant], to represent to the owner or lessee . . . ." Therefore, we conclude that the sworn statements in this case complied with MCL 570.1110(4), despite not being prepared and signed by the original lien claimants.[4]

[4] While the contractor may be in the best position to provide the substantive information necessary for the sworn statement, as Mard and Zolezzi contend, the CLA specifically authorizes

Mard and Zolezzi also argue that none of the sworn statements substantially complied with the CLA because they were not provided to Mard, the property owner with whom the seven contractors contracted, as provided by MCL 570.1110(9) and (10), which state:

> (9) 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.
>
> (10) If a subcontractor fails to provide a sworn statement under subsection (2) to the owner or lessee before recording the subcontractor's claim of lien, the subcontractor's construction lien is valid. However, a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien until the sworn statement has been provided.

There is no dispute that the seven contractors' sworn statements were provided to Lienholders, which the trial court found was sufficient.

"Owner" means a person holding a fee interest in real property or an equitable interest arising out of a land contract. MCL 570.1105(3). "Contractor" is defined as "a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property." MCL 570.1103(4). The term "a" refers to an indefinite object with a generalizing effect, while the term "the" designates a definite object with a specifying or particularizing effect. *Robinson v City of Lansing*, 486 Mich 1, 14; 783 NW2d 171 (2010). Because the definition of "contractor" refers to "the owner," in context, it is reasonable to construe a contractor as being someone who contracts with the owner of the real property upon which he improves. Support for this construction can be found in MCL 570.1107(1), which provides that "[e]ach contractor, subcontractor . . . who provides an improvement to real property has a construction lien upon the interest of *the owner* or lessee *who contracted for the improvement to the real property* . . . ." (Emphasis added.) Also, MCL 570.1114, which requires a construction lien to be based on a written contract, refers to "a written contract between *the owner* or lessee and the contractor." (Emphasis added.) Furthermore, the CLA refers to "the owner" in the context of payment due. MCL 570.1110(1); MCL 570.1110(9). Based on the foregoing, we conclude that the Legislature intended for "the owner" referred to in MCL 570.1110(9) and (10) to be the owner with whom the contractor contracted to do work and from whom payment was due.

Here, the seven contractors did not provide sworn statements to Mard. The factual situation in this case, however, is not one that the CLA expressly contemplates, where ownership

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the assignment of liens and provides no time constraints for when this can occur. The statute provides that the assignee "shall be subject to the same obligations, as if the [foreclosure] proceedings were being taken by, and in the name of, the lien claimant." MCL 570.1125. Thus, the assignee's obligation to provide accurate and complete information in the sworn statement is the same as the contractor.

of the real property changes before a contractor provides a sworn statement to the property's owner with whom he contracted. The question is whether provision of the sworn statement to Lienholders as the new owner substantially complied with the requirement in MCL 570.1110(9) and (10) that it be provided to "the owner."[5] We conclude that it does. In the litigation context, the owner can rely on the sworn statement as a list of potential lien claimants, as well as use it as an accounting for defense purposes. *Big L Corp*, 278 Mich App at 441-442. In general, these uses are equally important to a new property owner. Because improvements to real property, and thus subsequent claims of lien, run with the land, the new owner's title is clouded. *Dane Constr, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 292-293; 480 NW2d 343 (1991).

Also, a finding of substantial compliance is in keeping with the main purpose of MCL 570.1110, i.e., notice. See *Big L Corp*, 278 Mich App at 443-444 (unverified sworn statement substantially complied with MCL 570.1110(4) because owner had notice of its substance); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 510-511; 667 NW2d 379 (2003) (unverified sworn statement substantially complied with notice requirement of former MCL 570.1110(8) because owner had notice of its substance). Accordingly, provision of the sworn statements to Lienholders constituted substantial compliance with the requirement in MCL 570.1110(9) and (10) that the statement be provided to "the owner."

2. Statute of Limitations

Mard and Zolezzi also argue that, regardless of who prepared and received the sworn statements, the liens filed by the seven contractors, except Land Development Solutions, were barred because their sworn statements were not provided until after the statute of limitations had run. They also argue that the claims of lien filed by Kenneth Smith, Land Development Solutions, Magnum Equipment, C. Johnson & Son Excavating, and Aggregate Industries were barred because the contractors did not file a complaint, cross-claim, or counterclaim within the limitations period.

Mard and Zolezzi's argument is based on their reading of MCL 570.1110(9) and (10) in conjunction with MCL 570.1117(1), (4), and (6). MCL 570.1117 states, in pertinent part:

> (1) 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.
>
> * * *

[5] Because Mard was the owner at the time payment was due from each of the seven contractors, the seven contractors were obligated to provide it a sworn statement. MCL 570.1110(1). Therefore, the fact that ownership of the property later changed did not affect this duty.

> (4) Each person who, at the time of filing the action, has an interest in the real property involved in the action which would be divested or otherwise impaired by the foreclosure of the lien, shall be made a party to the action.
>
> * * *
>
> (6) Except as otherwise provided in subsection (1), a lien claimant who has been made a party to an action for foreclosure of a construction lien may enforce his or her own construction lien in the action by a cross-claim or counterclaim, and the owner or lessee may timely join other or potential lien claimants in the action.

There is no express requirement in the CLA that a sworn statement be filed within one year of filing a claim of lien. While MCL 570.1110(9) and (10) prohibit a lien-foreclosure action from being filed until the sworn statement is provided to the owner, filing a foreclosure action before filing a sworn statement does not sound an automatic death knell of the action. In *Alan Custom Homes*, 256 Mich App at 510-511, this Court found that the plaintiff's provision of its sworn statement to the owner defendants after the filing of its action to foreclose its lien, but before the summary disposition hearing, constituted substantial compliance with MCL 570.1110(8), currently subsection (9). The Court reasoned:

> Although plaintiff's inclusion of the lien-foreclosure claim in plaintiff's complaint and first amended complaint was premature under MCL 570.1110(8), the trial court could have allowed plaintiff to amend the complaint to include the lien-foreclosure claim after the verified sworn statement was delivered to defendants, but *before* the summary-disposition motion was heard. [*Id*. at 511 (emphasis in original).]

The plaintiff last performed work on the house in January 2000 and provided a sworn statement to the defendants in February 2001. *Id*. at 507, 511. The facts do not indicate when the plaintiff filed its claim of lien or lien-foreclosure action/complaint.

Given the specific question before the Court in *Alan Custom Homes*, we conclude that the import of its decision is that the defendants received the sworn statement before the summary disposition hearing. *Alan Custom Homes*, 256 Mich App at 511. In this case, Lienholders had notice of the seven contractors' sworn statements approximately 20 days before trial, which under the circumstances constituted substantial compliance. Lienholders, being comprised of the actual lien claimants, was aware of the sworn statements' substance well before trial. In addition, Lienholders was the one that the statement's notice was intended to benefit. Therefore, by its express statement at trial, Lienholders properly waived any defect in the sworn statement requirement in MCL 570.1110(9) and (10). See *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121, 130; 290 NW 408 (1980) (insurer could waive statutory notice provision).

Mard and Zolezzi further argue that five of the liens were unenforceable because the contractors did not file lien-foreclosure actions. MCL 570.1117(1) provides a one-year limitations period for filing such actions. *Church & Church, Inc v A-1 Carpentry*, 483 Mich 885; 759 NW2d 877 (2009). The seven contractors argue that they did not need to file individual

lien-foreclosure actions because they were made party defendants to the Milbocker action, which was filed within the limitations period.

Milbocker was statutorily required to add the seven contractors to its action giving them notice that foreclosure of the property in which they had a potential interest was sought. MCL 570.1117(4). At their discretion, the seven contractors could elect to file a cross-claim or counterclaim to pursue their own lien-foreclosure actions as long as they were filed within the one-year limitations period. MCL 570.1117(6). Inaction though could result in being permanently divested of the ability to enforce the lien. A trial court is only required to adjudicate the claims of each lien claimant who brings a lien-foreclosure action. MCL 570.1118(2).

The seven contractors erroneously assert that MCR 3.412 eliminates the need to file a lien-foreclosure action. MCR 3.412 provides:

> In an action to enforce a lien under MCL 570.1101 *et seq.*, or other similar law, if the plaintiff has joined others holding liens or others have filed notice of intention to claim liens against the same property, it is not necessary for the plaintiff to answer the counterclaim or cross-claim of another lien claimant, nor for the other lien claimants to answer the plaintiff's complaint or the cross-claim of another lien claimant, unless one of them disputes the validity or amount of the lien sought to be enforced. If no issue has been raised between lien claimants as to the validity or amount of a lien, the action is ready for hearing when at issue between the lien claimants and the owners, part owners, or lessees of the property.

By its plain terms, this rule relieves the plaintiff and added lien claimants of the obligation under MCR 2.110(B) to respond to each other's complaints, cross-claims, and counterclaims unless there is a dispute concerning the lien's validity or amount. Therefore, MCL 570.1117(6) requires that a lien claimant file his own action if he wants to enforce its lien. *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 348; 766 NW2d 30 (2008).

Consequently, were it not for the Milbocker action's unusual procedural history, we would agree that the liens of the five contractors who did not file their own lien-foreclosure actions were unenforceable.[6] In *American Savings Ass'n v I C I Dev Corp*, 400 Mich 74, 75-76; 252 NW 806 (1977), our Supreme Court addressed a similar factual situation, which warrants recitation in detail.

> On June 1, 1973, AMRCO filed with the Wayne County Register of Deeds its statement of account and lien in the amount of $9,827 against property owned by defendant I.C.I. Development Corporation, for labor and materials furnished in

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[6] Mard and Zolezzi assert that the trial court should have determined the validity of the construction liens before permitting the receiver's sale. Because they did not fully brief this question or include it in their statement of questions, we do not address it. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 458-459; 688 NW2d 523 (2004).

the construction of a certain building. On August 23, 1973, American Savings filed its complaint to foreclose mortgage on the subject premises, and joined as parties defendant many lien claimants including AMRCO. AMRCO filed its answer to the complaint, stating in substance that it was without sufficient information to form a belief as to most of the allegations, and reserved the right to file a counterclaim asserting its lien interests. A receiver of the realty was appointed on November 14, 1973. On May 10, 1974, the court, by stipulation of the parties, entered an order that all lien rights would be terminated and the property sold, free of claimed liens. Paragraph 4 of the trial court's order reads as follows:

> "That the lien rights or claims thereof of all parties litigant in and to the said premises be and hereby are terminated and that the claimed liens of said parties are hereby transferred to the proceeds of the sale of the said premises, and that the issues as to amount, validity and priority of payment of such liens, and the rights of American Savings Association under the Mortgage, Promissory Note and Guaranty referred to in its Amended Complaint For Foreclosure Of Mortgage be hereafter determined by this Court in accordance with the law in such case made and provided."

On June 27, 1974, the realty was sold. On October 25, 1974, American Savings filed its motion for summary judgment which was granted over the vigorous contention of AMRCO that, after May 10, it would have been a violation of the court's own order for AMRCO to have clouded title to the property by filing a counterclaim to foreclose its lien and notice of lis pendens, pursuant to MCL 570.10.[7] [Footnote added.]

The Court held:

> The trial court's order can only be read as terminating the rights of all litigants to proceed further against the realty. As of the entry of that order, the enforcement provisions of the statute became inapplicable. Since, as of that date,

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[7] MCL 570.10 provided:

> Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of lis pendens recorded in the office of the register of deeds, shall have the effect to continue such proceedings. And in such proceedings, the complainant shall make all persons having rights affected or to be affected by such liens as recorded in the office of the register of deeds, and all persons holding like items so recorded, and those having recorded notice of intention to claim a lien, parties to such action.

> AMRCO was still within the one-year limitations period, any of its lien rights which had attached to the realty were transferred pursuant to the order to the proceeds of sale and are to be determined by the trial court according to the attachment and priority provisions of the statute. Because AMRCO was within the limitations period when its lien rights were terminated, further pleadings are not controlled by the lien statute, but are governed by statute and court rule relating to civil actions generally. [*American Savings Ass'n*, 400 Mich at 77.]

In the Milbocker action, the trial court's order authorizing the sale of Sherman Hills stated that the "Buyer will assume and satisfy all construction liens recorded against the property . . . evidenced by signed discharges of construction liens in recordable form to be provided at closing." It further stated, "The construction lien claimants in this case will enter into any and all necessary stipulations and orders dismissing all claims and cross-claims against those parties present at the February 28, 2008 hearing on the Motion."[8] The trial court was cognizant of its need to determine the liens' validity and amount given that Lienholders's members had applied their liens' value to the purchase price of Sherman Hills. Thus, in an order issued two weeks later, the trial court stated that it "has determined that there is a genuine issue of material fact as to the validity of the construction liens," which it would later resolve.

As of the date the trial court entered its March 31, 2008, order authorizing the receiver to sell Sherman Hills, the five contractors who had not filed lien-foreclosure claims were within the CLA's one-year limitation period, which ceased to be applicable to these liens.[9] Hollandia and Infrastructure filed lien-foreclosure claims within the limitations period. Thus, Sherman Hills was sold subject to the seven contractors' liens, which clouded the property's title.[10] *Dane Constr*, 192 Mich App at 292-293. The remedy in *American Savings* was to remand for a determination of the lien claimant's rights. Here, the trial court has already determined the validity and amount of the seven contractors' liens. Mard and Zolezzi have challenged on appeal the liens' validity, which we have addressed, but not amount. Therefore, pursuant to this Court's powers regarding relief and in the interest of judicial economy, we conclude that a remand is unnecessary. MCR 7.216(A); *Mich Nat'l Bank v Mich Livestock Exch*, 432 Mich 277, 295-296; 439 NW2d 884 (1989) (court can forego remand in the interests of judicial economy).

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[8] The seven contractors were represented at this hearing.

[9] The substance of the statutes in effect when *American Savings* was decided was substantially the same as that in the CLA for purposes of this analysis. Compare former MCL 570.9 to current MCL 570.1117(1) and former MCL 570.10 to current MCL 570.1117(4).

[10] MCL 570.1123(4) provides that a sale by the receiver vests in the purchaser "all the right, title, and interest in the real property" that the owner whose interest is being foreclosed had at the date of the execution of the contract for the improvement or any time thereafter.

Consequently, we affirm the trial court's March 2, 2009, final order in the Milbocker action.

Affirmed. As the prevailing parties, appellees may tax costs. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio