

STATE OF MICHIGAN
COURT OF APPEALS

MARINE CITY CEILING & PARTITIONS, INC.,

Plaintiff-Appellee,

v

DH BUILDING COMPANY, INC. d/b/a
DELCOR HOMES, UPTOWN VILLAGE, LTD.,
FENTON POURED WALLS, INC., TCF
NATIONAL BANK, CRYSTAL ELECTRIC,
INC., CARTER LUMBER COMPANY, INC.
a/k/a CARTER-JONES COMPANIES, INC.,
AMERICAN RESIDENTIAL SERVICES OF
MICHIGAN, INC. d/b/a ANDY'S STATEWIDE,
R. ADAMS PAINTING, L.L.C., RBC
MORTGAGE COMPANY, ADAMS
CONCRETE, INC., EPLEY EXCAVATING,
L.L.C., PRE-FIT DOOR, INC., CHEROKEE
CARPET & FLOOR COVERING, INC.,
BEDIENT CONSTRUCTION, INC., SUPERIOR
MATERIALS, L.L.C., and FIFTH THIRD BANK,

Defendants,

and

CHELSEA LUMBER COMPANY and
QUALITY HEATING AND COOLING, INC.,

Defendants-Appellees,

and

SRB SERVICING, L.L.C.,

Defendant-Appellant.

UNPUBLISHED
March 1, 2012

No. 301234
Washtenaw Circuit Court
LC No. 09-000637-CH

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant, SRB Servicing, L.L.C., appeals as of right an order denying its motion for summary disposition and granting summary disposition in favor of construction lien claimants Marine City Ceiling & Partitions, Inc., Chelsea Lumber Company, and Quality Heating and Cooling, Inc. (the construction lien claimants) in this priority dispute. We affirm.

In 2002, Uptown Village, Ltd. was a developer of Uptown Village, a condominium project. The site plan provided for the development of the condominium subdivision in several phases, with the first phase involving 11.93 acres and a remaining 50 acres reserved for future development. The Master Deed of Uptown Village was amended with the addition of land as the condominium project progressed and expanded in size. In March of 2005, Uptown Village, Ltd. executed a future advance construction mortgage in favor of Fifth Third Bank. The mortgage granted a security interest in all of the land, premises, and property involved in the Uptown Village condominium project, including the property reserved for the expanding subdivision. On August 4, 2005, a fifth amendment to the Master Deed was recorded “for the purpose of expanding the size of the Condominium to include Units 119 – 149 within the Condominium by the addition of the land described in Section 1 below.” In November of 2005, a notice of commencement was recorded with regard to unit 142, but the first building permit was issued in February of 2008.

The construction lien claimants were subcontractors which, in 2008, provided labor, materials, and supplies for the Uptown Village condominium project, including unit 142. Their construction liens were recorded in 2008. In February of 2009, SRB Servicing purchased the promissory notes executed by Uptown Village, Ltd. in favor of Fifth Third Bank, and took assignment of Fifth Third Bank’s interests. Upon default by Uptown Village, Ltd., SRB Servicing foreclosed and obtained title to all of the property involved in the Uptown Village condominium project. This action followed. The construction lien claimants sought foreclosure of their construction liens which SRB Servicing contested by alleging that its mortgage interest had superior priority.

Subsequently, a motion for partial summary disposition was filed, limited to the legal issue of which interests had priority—the mortgage or the construction liens. SRB Servicing argued that its mortgage had priority because it was recorded in 2005 before the first actual physical improvement on unit 142 occurred in 2008. The construction lien claimants argued that their liens had priority because the relevant physical improvement for determining priority was when the Uptown Village condominium project began as a whole, not when improvement was made specifically to unit 142. The trial court, citing *MD Marinich, Inc v Michigan Nat’l Bank*, 193 Mich App 447; 484 NW2d 738 (1992), agreed with the lien claimants. The trial court held that the construction project contemplated in this case was the entire Uptown Village condominium project and the development of unit 142 was not a separate project. Because the first actual physical improvement to the property occurred in 2003, prior to the mortgage being recorded in 2005, the construction liens had priority over the mortgage. Thus, summary

disposition was granted in the construction lien claimants' favor and a judgment of foreclosure of those construction liens was entered. This appeal followed.

SRB Servicing argues that the construction liens did not have priority over its mortgage because actual physical improvement on unit 142 commenced after the mortgage was recorded; thus, it was entitled to summary disposition, not the lien claimants. We disagree.

The trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Cedroni Ass'n v Tomblinson, Harburn Ass'n*, 290 Mich App 577, 584; 802 NW2d 682 (2010). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a claim and is properly granted if there is no genuine issue as to any material fact, entitling the moving party to judgment as a matter of law. *Id.* We also review de novo questions of statutory interpretation. *Herman v Berrien Co*, 481 Mich 352, 358; 750 NW2d 570 (2008).

MCL 570.1119 of the Construction Lien Act (CLA) applies to this priority dispute and provides, in relevant part, as follows:

(3) A construction lien arising under this act shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.

(4) A mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act.

And "actual physical improvement" means: "the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement." MCL 570.1103(1).

The issue in this case is whether "the first actual physical improvement" referenced in MCL 570.1119 pertains to the entirety of this condominium project or to each individual condominium unit. The construction lien claimants argue that "the first actual physical improvement" to the real property of the Uptown Village condominium project occurred in 2003, before the mortgage was recorded; thus, their interests had priority over the mortgage. SRB Servicing claims that because "the first actual physical improvement" to condominium unit 142 occurred after the mortgage was recorded, its interest had priority over any construction liens. We, like the trial court, agree with the lien claimants.

This Court in *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 295726, August 2, 2011), recently addressed a very similar issue as is raised in this case. In *Jeddo*, subcontractors sought the foreclosure of construction liens for work performed on one residential lot in a subdivision development. A mortgage had

been recorded before that particular work occurred. The mortgagee argued that its interest was higher in priority than the construction liens because the mortgage was recorded before physical improvements were made on the specific residential lot involved in the lien claims. The *Jeddo* Court rejected the argument, noting that the mortgage itself pertained to the entire subdivision at issue, which included the specific lot “regardless whether the first actual physical improvements were made to other parts of the property covered by the mortgage.” *Jeddo Drywall, Inc*, slip op at 5. Further, the *Jeddo* Court rejected the argument that improvements on the specific lot constituted a different “project,” holding that the work related to the same project—the continued development of the subdivision. *Id.*, slip op at 5-6. And with regard to the argument that a mortgagee would lack notice of construction lien interests existing at the time a loan is made, the *Jeddo* Court concluded: “[w]hen, as here, there is a major, multi-phase subdivision project in which the land is cleared, prepped and phases and lots have been fully developed over several years, a lender has ample, visible notice that their mortgage interest may be subject to the priority of liens filed by trades working on the development.” *Id.*, slip op at 7.

Here, the mortgage interest was a future advance construction mortgage pertaining to the development of Uptown Village, a condominium subdivision project consisting of numerous condominium units that were to be constructed over time in several phases, as clearly contemplated in the mortgage documents. The property that secured the future advance mortgage was the entirety of the property involved in the Uptown Village condominium project, including the property reserved for the expanding subdivision and that eventually became known as unit 142. It is undisputed that the first actual physical improvement of the property in this multi-phase condominium project began in 2003, well before the mortgage was executed. It is also uncontested that the lien claimants provided labor, material, and supplies for this condominium project, including unit 142. Improvements made to unit 142 were related to the same project—the continued development of Uptown Village, a condominium subdivision. It is well-settled that construction liens relate back to the first actual physical improvement “regardless of the time when, or the person by whom the particular work was done or the materials furnished for which a lien is claimed.” *Jeddo Drywall, Inc*, slip op at 4, quoting *Marinich*, 193 Mich App at 452, quoting *Kay v Towsley*, 113 Mich 281, 283; 71 NW 490 (1897).

We reject the contention of SRB Servicing that the notice of commencement defined the project for purposes of this priority dispute. In *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997), our Supreme Court stated that the purpose of the CLA is “to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs.” *Id.* Toward that end, the act requires “an exchange of information between the owner of the property, the general contractor, subcontractors, material suppliers, and laborers.” *Id.* That flow of information begins with the property owner recording a notice of commencement, MCL 570.1108, before any improvement is made on the subject property. *Id.* at 122. The notice of commencement “contain[s] certain information necessary for the preparation and filing of any future construction liens.” *Id.* The notice of commencement does not define the project for purposes of determining lien priority.

Further, we reject the claim of SRB Servicing that it lacked the requisite notice that there may be lienholders with higher priority interests. As in the *Jeddo* case, this was a known, multi-phase subdivision project. At the time the future advance construction mortgage was executed, there was ample evidence that the development was in progress and that there was property to support Uptown Village, Ltd.'s plan to expand the subdivision over time as set forth in its plan. Accordingly, the trial court properly granted summary disposition in favor of the lien claimants.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello