STATE OF MICHIGAN

COURT OF APPEALS

ROGERS EXCAVATING, INC., Plaintiff-Appellant,	UNPUBLISHED October 24, 2013
v	No. 308514 Oakland Circuit Court
MANA PROPERTIES, L.L.C., and CAPITAL SOURCE BANK, Defendants-Appellees.	LC No. 2009-104148-CK

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff Rogers Excavating, Inc. (Rogers), appeals as of right the trial court's judgment entered after a bench trial in this action involving Rogers' breach of contract claim against defendant Mana Properties, LLC (Mana), and the validity of Rogers' construction lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, relative to Mana's real property. The trial court, while at first suggesting that the only contract was between Rogers and McQuillan Construction, LLC (McQuillan), and not Rogers and Mana, nevertheless proceeded to award Rogers $36,876 for breach of contract damages; Rogers had requested contract damages totaling $95,824. The trial court additionally ruled that Rogers' recorded construction lien was invalid, finding that Rogers was not entitled to a lien for failure to comply with certain requirements of the CLA. We affirm the trial court's ruling that Rogers is entitled to damages for breach of contract; however, we vacate the award of $36,876 and remand for entry of judgment for the full sum requested by Rogers on its contract claim, $95,824. Further, we reverse the trial court's ruling that Rogers' construction lien was invalid and remand for reinstatement of the lien against Mana's property. Finally, to the extent that the trial court ruled that a mortgage held by defendant CapitalSource Bank (CSB) would have had priority over Rogers' construction lien, we reverse the ruling and remand for entry of judgment reflecting that the construction lien has priority over the mortgage under the CLA. Accordingly, we affirm in part, vacate and reverse in part, and remand for further proceedings.

We initially note that the parties stipulated to many of the facts and that these uncontested facts were included in the amended final pretrial order. Mana owned real property in Southfield, Michigan, upon which it planned to construct a daycare facility. In May 2007, Mana executed a construction management agreement with McQuillan, pursuant to which McQuillan was to serve as the construction manager with respect to the project to build the daycare facility. McQuillan

was required to "supervise the completion of the [c]onstruction" under the agreement. Further, pursuant to the agreement, Mana, as owner, was designated as being "solely responsible for the identification, retention, contracting for, and payment of any and all subcontractors, suppliers, materialmen, and laborers in connection with the [c]onstruction."

Ken McQuillan, the sole member of McQuillan, informed Carroll Rogers, the sole shareholder of Rogers, about the construction project and asked Carroll to submit a bid. Rogers was a construction company that engaged in excavation work, land balancing, dirt removal, and road building. Rogers submitted a proposal to Mana, which was subsequently accepted and formalized into a contract in October 2007. The contract expressly indicated that it was between Mana and Rogers.[1] The contract was signed by Carroll Rogers on behalf of his company and by Mack Allen, who, along with his wife, were the sole members of Mana. Ken McQuillan signed the contract as a witness, but he also placed his initials on all of the remaining pages of the contract where it called for the developer's initials. Carroll Rogers testified that he witnessed Mack Allen execute the contract on behalf of Mana on a line marked "Owner," that Ken McQuillan signed the contract as a witness, and that Ken had mistakenly placed his initials on the pages of the contract, given his belief that he was witnessing those particular pages. Neither Mack Allen nor Ken McQuillan could remember executing the contract, but they both acknowledged that the signatures on the contract appeared to be their signatures. The contract price was $121,210.

In January 2008, after Rogers had already started work on the project, Mana recorded a notice of commencement of physical improvements to the real property. MCL 570.1108 ("Before the commencement of any actual physical improvements to real property, the owner . . . shall record . . . a notice of commencement[.]"). The notice of commencement was signed by Mack Allen, although it was Ken McQuillan who drafted and recorded the notice. In the space where the general contractor's name was to be supplied, the words "See Owner" were inserted. The notice of commencement identified Fidelity National Title Insurance (Fidelity) as Mana's "Designee" with respect to the construction project. The notice was provided to Rogers in April 2008. Carroll Rogers prepared a notice of furnishing, MCL 570.1109, and he testified that he hand-delivered a copy to Mana and McQuillan. Mack Allen could not recall receiving the notice of furnishing. There is no dispute that Mana's designee – Fidelity – was not served with the notice of furnishing.

With respect to sworn statements, MCL 570.1110, McQuillan prepared and provided them to Mana and Stearns Bank, which was the lender that financed the construction project, each time that McQuillan requested payment on behalf of Rogers and various subcontractors. Mack Allen of Mana testified that he relied on these sworn statements from McQuillan in authorizing draw requests from Stearns Bank. Along with the sworn statements, McQuillan

[1] The contract provided that it was made and entered into "by and between Mana Properties . . ., party of the first part, . . . and Rogers Excavating . . ., party of the second part[.]" The last page of the contract provided for the signatures of representatives from "Mana Properties" and "Rogers Excavating."

submitted draw requests and waivers of lien to Stearns Bank, which authorized wire transfers of money directly to McQuillan's bank account. This was done pursuant to the loan arrangement between Mana and Stearns Bank. There were 12 draws from Stearns Bank during the project, totaling in excess of $950,000, which had been authorized by Mana and eventually paid to McQuillan. In the sworn statements prepared by Ken McQuillan, he showed payments to Rogers that had never actually been made. McQuillan failed to pay some of the draw funds to Rogers that had been designated for Rogers. Mana never made any payments to Rogers directly; rather, Rogers received payments from McQuillan.

Prior to the litigation, Rogers never provided to Mana or McQuillan a sworn statement in the exact form set forth in MCL 570.1110(4). Rogers, however, did include with each of its invoices mailed to Mana a document titled "Statement." Those statements contained, in itemized form based on specific tasks and materials, the contract amount, the amount expended for work and materials in the current billing cycle, the amount expended for work and materials previously completed or used, the total amount expended for work and materials to date, the amount of payments received, the amount of payments due and owing, the percentage of work completed, and the amount needed to finish the project. The statements also included basic information regarding the project, Rogers' name, address, and phone and fax numbers, and Mana's name and address. Rogers provided both Mana and McQuillan with a formal sworn statement consistent with MCL 570.1110(4) shortly after filing this lawsuit.

As indicated above, the original contract price was $121,210. However, this price was increased on the basis of five change orders[2] and the cost of a permit, bringing the price to $170,976, which included $2,832 in late fees. Rogers did not complete work valued at $3,202, reducing the total amount due to $167,774. Rogers was paid $71,950 during the course of its work, leaving a total amount due of $95,824. In a request for admissions, McQuillan conceded that it received loan draws totaling approximately $130,898 on Mana's construction loan with Stearns Bank that were earmarked for payment to Rogers. Again, Rogers only received $71,950 in payments, and, even had the full $130,898 earmarked for Rogers been actually paid to Rogers, it still would have left $36,876 due under the contract as modified by the change orders.

As noted earlier, McQuillan delivered waivers of construction lien, MCL 570.1115, to Stearns Bank, along with sworn statements prepared by McQuillan, as necessary for the bank to release construction funds that comprised the loan to Mana. The waivers of construction lien were allegedly executed by Carroll Rogers. The trial court effectively determined that Rogers had indeed signed the lien waivers and provided them to McQuillan. Carroll Rogers claimed that he never signed any waivers of lien and that his purported signature on the waivers was a forgery. Rogers hired a forensic handwriting expert who came to the conclusion that the signature on the waivers was not that of Carroll Rogers. The expert witness, however, died prior to trial and before she could be deposed. The trial court refused to allow the expert's written

[2] The change orders were either signed by McQuillan and Mana jointly or by Rogers and Mana jointly; there were no change orders signed by Rogers and McQuillan jointly. Thus, the only change orders signed by Rogers were ones that were also executed by Mana.

opinion to be admitted into evidence, ruling that the opinion constituted hearsay absent any applicable exception.

In October 2007, Rogers commenced working on the project. On August 21, 2008, Mana borrowed approximately $1.4 million from MainStreet Lender, i.e., "the take out lender at the end of the construction," and the loan was secured by a mortgage on the property at issue. The mortgage was received and recorded on September 22, 2008. On November 14, 2008, Rogers recorded a claim of construction lien on Mana's property in the amount of $95,824. The lien was recorded within ninety days after Rogers last provided labor or materials on the construction project. On March 18, 2010, CSB acquired MainStreet Lender's portfolio of loans, including the promissory note executed by Mana. On that same date, MainStreet Lender assigned the mortgage to CSB, which assignment was recorded on June 24, 2010.

Rogers filed its lawsuit on September 25, 2009. In its second amended complaint, which is the controlling pleading, Rogers brought two claims against Mana. Count I was for breach of contract, and the second count was a claim seeking to foreclose its construction lien. With respect to the breach of contract claim, Rogers alleged that it had performed construction services under a contract with Mana that required a total payment of $167,774, that it received payments of $71,950, that $95,824 was due and owing under the contract, and that Mana's failure to pay the amount owing constituted a breach of the contract. With respect to the lien foreclosure claim, Rogers alleged that it had recorded a valid and enforceable claim of lien in the amount of $95,824 and that it was entitled to foreclose on the lien. Rogers indicated in the complaint that it had named CSB as a party defendant given that CSB had a mortgage interest in the property and that the CLA requires joinder in foreclosure actions of all persons holding an interest in the property. See MCL 570.1117(4).[3] We note that the CLA permits a lien claimant to bring a foreclosure action, along with "an action on any contract from which the lien arose." MCL 570.1117(5).

Mana filed a third-party complaint against McQuillan and Ken McQuillan, alleging breach of contract, breach of fiduciary duty, conversion, and unjust enrichment. The gist of the action was that Mana provided payments to McQuillan to cover amounts owed to Rogers for services rendered, but McQuillan failed to forward all of those funds to Rogers. Mana also filed a counterclaim against Rogers, alleging that Rogers created an illegal cloud on the title by improperly recording the claim of lien. Ken McQuillan ultimately avoided personal liability in the third-party action brought by Mana by obtaining a discharge in bankruptcy. However, in that third-party action, a consent judgment was ultimately entered in favor of Mana against McQuillan (the company) in the amount of $95,824, which was the amount being requested by Rogers in its suit against Mana.

[3] In the initial complaints, Rogers had named MainStreet Lender as a defendant, as CSB had not yet been assigned the mortgage. Rogers had also named Cadillac Asphalt, LLC, as a defendant, indicating that Cadillac had an interest in the property; however, Rogers later voluntarily dismissed the claim against Cadillac.

CSB filed a motion for summary disposition under MCR 2.116(C)(8) against Rogers on the construction lien foreclosure count, arguing that Rogers' failure to provide Mana with sworn statements as required by the CLA effectively defeated any claim of lien. CSB also contended that, assuming the validity of Rogers' lien, CSB's mortgage had priority over the lien. Mana subsequently joined CSB's motion for summary disposition. CSB then filed a separate motion for summary disposition under MCR 2.116(C)(10) against Rogers, making the same two arguments as in the (C)(8) motion. But CSB additionally argued that it was entitled to summary disposition because Rogers never served a notice of furnishing on Mana's designee, Fidelity, and because the lien was invalid as Mana had made payments to McQuillan designated for Rogers in reliance on sworn statements and lien waivers provided to Mana. Mana also joined CSB's (C)(10) motion. A single hearing was conducted on all of the motions, and the trial court denied the motions in a cursory written opinion and order, simply ruling that summary disposition was not appropriate because Rogers "stated a prima facie case and there are genuine issues of material fact."

After a three-day bench trial, the trial court issued a written opinion and order of judgment. As an initial finding of fact, the court appeared to have viewed Rogers' contract as being with McQuillan and not Mana. The court stated, "McQuillan accepted [Rogers'] bid and hired [Rogers] as a subcontractor to provide services . . . for $121,210[.]" The trial court found that Rogers violated the CLA by failing to provide Mana's designee, Fidelity, with a notice of furnishing and by failing to provide sworn statements to Mana and McQuillan when requesting payments. The court concluded that Rogers failed to substantially comply with the CLA and was therefore not entitled to any lien on the property. The trial court then ruled that Mana had paid McQuillan for the work completed by Rogers in reliance on sworn statements prepared by McQuillan and lien waivers executed by Rogers. Taking this into consideration with the fact that Rogers violated the CLA, the court concluded that "it would not be equitable for Mana to be required to pay again for [Rogers'] services . . . [and the] construction lien must be removed from the property."

While the trial court entered a "no cause" on Rogers' lien foreclosure action, ordered the lien removed, and found that Rogers had no lien rights in the property, the court also entered judgment in favor of Rogers on its breach of contract claim, but only in the amount of $36,876. The court came to this amount by taking the total price of Rogers' services, $167,774, and offsetting it by the amount that McQuillan had received in loan draws that were earmarked for Rogers, $130,898, leaving $36,876. In other words, the court gave Mana credit for all of the funds that it had provided to McQuillan, via loan draws from Stearns Bank on Mana's construction loan, that were designated for payment to Rogers. But, as noted above, the credited amount of $130,898 still fell $36,876 short of the total price of Rogers' services, so the court ordered Mana to pay Rogers that difference based on breach of contract.

On appeal, Rogers first argues that the trial court erred in finding that a contract existed between Rogers and McQuillan and not Rogers and Mana. Rogers contends that there was an abundance of evidence showing that Rogers entered into a contract directly with Mana.

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 512; 667

NW2d 379 (2003), citing MCR 2.613(C). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A factual finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Interpretation of the CLA is a legal issue subject to de novo review, *DLF Trucking, Inc v Bach*, 268 Mich App 306, 309; 707 NW2d 606 (2005), as is the existence, construction, and application of a contract, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

In *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005), our Supreme Court reviewed the well-established principles applicable to the construction of a contract:

> A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.* Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that the general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. [Citations, alterations, and internal quotation marks omitted.]

Here, the trial court initially found that McQuillan accepted Rogers' bid and hired Rogers "as a subcontractor to provide services including installation of sewers, water mains, curbs and asphalt and site filling and grading for $121,210[.]" These services and the specific price of $121,210 are referenced in the contract that, from all outward appearances, was executed between Mana and Rogers. In its factual findings, the trial court did not expressly find that there was no contract between Mana and Rogers or that there had been a contract between the two but it was unenforceable, invalid, rescinded, or transformed into a contract between Rogers and McQuillan. The language used by the trial court did seem to suggest that Rogers and McQuillan had a contract. At the end of its opinion and order, the trial court ruled that Rogers' "monetary demand for $167,774[] under the breach of contract claim[4] must be offset by the amount received by McQuillan for payment to [Rogers][,] [and] [t]herefore [Rogers] is entitled to payment of $36,87[6] from Mana that exceeded the amount of loan draws earmarked for [Rogers]." The trial court then concluded that Rogers was entitled to judgment against Mana "on its breach of contract claim in the amount of $36,87[6]." Although the trial court never expressly stated that there was a contract between Mana and Rogers, a ruling that Rogers was entitled to breach of contract damages against Mana necessarily implied a ruling that a valid and

[4] We note that Rogers did not make a monetary demand of $167,774 on its breach of contract claim. Rather, Rogers claimed that the total price for its work on the project was $167,774, and it demanded contract damages in the amount of $95,824, considering that it had been paid $71,950.

enforceable contract had indeed existed between Rogers and Mana. We find it difficult to reconcile the provisions in the trial court's opinion and order that appear to be at odds. Accordingly, we shall proceed on two paths, i.e., we shall examine whether the court erred in failing to find that there was a contract between Mana and Rogers, assuming such were the case, and, assuming the court instead found that Mana and Rogers had a contract, we shall examine whether the court erred in failing to award Rogers the full amount requested for contract damages, $95,824.

Assuming that the trial court found that a valid and enforceable contract existed between Rogers and Mana and that Mana breached the contract, Rogers would be entitled to $95,824 in contract damages. There is no legal basis to offset Rogers' recovery by amounts paid by Mana to McQuillan that were earmarked for Rogers. In a contract action, "the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). "The proper measure of damages for a breach of contract is 'the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached.'" *Id.* (citation omitted). Rogers was owed and never received $95,824 for services rendered pursuant to a contract with someone, and if the contract was with Mana, the entire $95,824 would be owed by Mana to Rogers. In that scenario, McQuillan's failure to forward Mana's funds to Rogers cannot defeat Rogers' entitlement to the full benefit of its bargain under the contract with Mana. Rather, Mana was contractually obligated to pay Rogers the full contract price, with Mana being left with the remedy of pursuing damages against McQuillan, as occurred in this case.

Assuming that the trial court found that there was a contract between Rogers and McQuillan but no contractual relationship between Rogers and Mana, the court erred. Mana and CSB argue that the trial court did not err in finding that there was no contract between Rogers and Mana. They maintain that the court properly found that, through the course of performance or otherwise, the parties contractually aligned themselves as owner (Mana), general contractor (McQuillan), and subcontractor (Rogers). Mana argues that the testimony supports it contention that Ken McQuillan may have fraudulently executed the contract, possibly leading to a conclusion by the trial court that Rogers and Mana had no contract.

With respect to whether there existed a valid, enforceable contract between Mana and Rogers, we shall address the issue from multiple perspectives, which we are forced to do given the imprecision and lack of clarity in the trial court's ruling. We first address the possibility that the court was of the position that neither Mack Allen nor any Mana representative ever signed the contract and that the document was the result of fraud and forgery. If this was indeed the court's unexpressed factual finding, it constituted clear error. We initially note that the plain language of the contract reflected that it was between Mana and Rogers, even with Ken McQuillan's initials on each page on the spot designated for the developer's initials, which we find inconsequential given all of the indicia showing that the contracting parties were Mana and Rogers. And Ken McQuillan clearly signed as a "WITNESS" on the last page of the contract. Carroll Rogers testified that he witnessed Mack Allen signing the contract on behalf of Mana and observed Ken McQuillan signing the contract as a witness. And both Allen and Ken McQuillan acknowledged that the signatures on the contract appeared to be their signatures, although they had no recollection of signing the document. This evidence by no means established a forgery or fraud or that Mana was not a party to the contract. We are unconvinced by the argument posed

by Mana and CSB that the trial court chose not to believe the pertinent testimony of Carroll Rogers on the subject and that we must defer to the trial court's credibility assessments. While true that we defer to the court's determination concerning credibility, MCR 2.613(C), the trial court never indicated in its opinion that Carroll Rogers lacked credibility. Moreover, assuming that Carroll Rogers was not a credible witness, fraud or forgery claims remained tenuous, considering that Mack Allen never denied executing the contract, nor did he testify that he would never have signed such a contract. Allen instead agreed that the signature on behalf of Mana found in the contract looked like his signature.

To the extent that the trial court simply concluded that the contract was between Rogers and McQuillan regardless of any fraud or forgery, perhaps on the basis of McQuillan's initials being placed on spaces designated for the developer, the court erred. Again, the contract was plainly and unambiguously between Rogers and Mana.

We next address the possibility that the trial court found that, through the course of performance, the contract had effectively been rescinded, with a new contract arising between Rogers and McQuillan, also based on course of performance. On a similar note, we shall also ponder whether the court found that, through the course of performance, the contract was modified such that it became a contract between Rogers and McQuillan. "[T]he freedom to contract also permits parties to enter into new contracts or modify their existing agreements." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370-371; 666 NW2d 251 (2003). There must exist "a mutual intention of the parties to waive or modify the original contract[,]" and when parties mutually modify an earlier contract, "rescission of the terms of the prior agreement is a necessary implication." *Id.* at 372-373. With respect to "course of conduct," the Supreme Court in *Quality Prod*, *id.* at 373-374, observed:

> [I]n situations where a party relies on a course of conduct to establish modification, mutual assent is less clear and thus the rescission, or *waiver*, of the original contract's terms is not so evident. As a result, where course of conduct is the alleged basis for modification, a waiver analysis is necessary.
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> As we have stated in other contexts, a waiver is a voluntary and intentional abandonment of a known right. This waiver principle is analytically relevant to a case in which a course of conduct is asserted as a basis for amendment of an existing contract because it supports the mutuality requirement. Stated otherwise, when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied. [Citations omitted.]

Here, we reject the proposition that, through the course of conduct, the existing contract between Rogers and Mana had been rescinded or transformed into a contract between Rogers and McQuillan. There was no clear and convincing evidence to support a conclusion that Rogers waived performance of the contract by Mana or that Rogers agreed to a substitution of parties under the contract (McQuillan substituting for Mana). Although there was evidence that Mana, McQuillan, and Rogers acted somewhat in accordance with typical behaviors attributable to owners, general contractors, and subcontractors relative to construction projects, the evidence did

not suffice to create a waiver on the part of Rogers that effectuated a rescission of the contract or to show a substitution of contracting parties, such that the plain and unambiguous language of the contract could be ignored.[5]

In sum, there was a contract between Mana and Rogers, it was valid and enforceable as between those two parties, it was breached by Mana, and Rogers is entitled to $95,824 in contract damages. To the extent that the trial court ruled otherwise, the court's ruling is reversed.[6]

We next address the validity of the claim of lien recorded by Rogers. We initially note that the CLA, and in particular MCL 570.1302(1), provides:

> 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. [Emphasis added.]

Rogers argues that it was error for the trial court to invalidate the construction lien for failure to comply with the notice-of-furnishing requirement. Rogers contends that a notice of furnishing was not even required because it had a direct contract with Mana. In the alternative, Rogers maintains that it substantially complied with the notice-of-furnishing requirement by delivering a notice to Mana and McQuillan, even though Mana's designee, Fidelity, was not provided a notice. We agree with both propositions. MCL 570.1109(1) provides, in part, that "[a] contractor is not required to provide a notice of furnishing to preserve lien rights arising from his or her contract directly with an owner or lessee." Given our ruling that a valid and enforceable contract existed between Rogers and Mana, a notice of furnishing did not have to be served by Rogers. See *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 130-131; 560

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[5] A substitution of parties gives rise to the legal concept of "novation." "A novation requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one." *In the Matter of the Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986). Consent to a novation need not be in writing, "but may be implied from the facts and circumstances of the transaction." *Id.* The record is insufficient to establish the requirements of a novation whereby McQuillan became obligated under the contract in place of Mana.

[6] Further support for the conclusion that Mana and Rogers had a contract can be found in the construction management agreement executed by Mana and McQuillan, which provided that Mana would be solely responsible for "contracting for . . . any and all subcontractors." Additionally, the only change orders signed by Rogers were ones that were also executed by Mana.

NW2d 43 (1997).[7] The purpose of a notice of furnishing is to notify owners of the identity of subcontractors improving the owner's property who may become future lien claimants. *Id.* at 131. Obviously, if there is a direct contractual relationship, the owner is more than aware of the contractor's identity who will be doing the work on the owner's property and who may file a claim of lien against the property.

Moreover, MCL 570.1109(1) requires delivery of a notice of furnishing to a designee and a general contractor. And a designee is simply a "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" the CLA. MCL 570.1104(2). Considering the evidence that Carroll Rogers delivered the notice of furnishing to McQuillan and the owner itself, Mana, there was substantial compliance with MCL 570.1109's notice-of-furnishing requirement. The trial court's ruling to the contrary was error.

With respect to the failure of Rogers to provide sworn statements in the exact form specified in MCL 570.1110, not only does MCL 570.1302(1) require us to employ a substantial compliance test, MCL 570.1110(4) itself expresses that a sworn statement must be "substantially" in the form of the sworn statement set forth in the statute. A sworn statement must be provided by a contractor or subcontractor to an owner when demanded by the owner or when payment is due or requested. MCL 570.1110(1)-(3). Under MCL 570.1110(9) and (10), a contractor or subcontractor's failure to provide a sworn statement to the owner before recording a construction lien does not render the lien invalid; however, an action to enforce the lien may not be filed until a sworn statement is provided.

Here, Rogers delivered statements with its invoices, which statements contained, in itemized form based on specific tasks and materials, the contract amount, the amount expended for work and materials in the current billing cycle, the amount expended for work and materials previously completed or used, the total amount expended for work and materials to date, the amount of payments received, the amount of payments due and owing, the percentage of work completed, and the amount needed to finish the project. The statements also included basic

[7] Mana and CSB present an argument that *Vugterveen* should be ignored because the Supreme Court in *Big L Corp v Courtland Constr Co*, 482 Mich 1090; 757 NW2d 852 (2008), subsequently held that the rules of statutory construction announced in *Vugterveen* were improper. The principles or rules of construction at issue regarded the mandate to liberally construe the CLA as a remedial act and to employ a substantial compliance test, MCL 570.1302(1). *Big L Corp*, 482 Mich at 1090. The *Vugterveen* Court had cited MCL 570.1302(1) in support of the principles. *Vugterveen*, 454 Mich at 129. The only problem that the Supreme Court had in *Big L Corp* was that the Court of Appeals' opinion in *Big L Corp* merely cited *Vugterveen* for the principles instead of MCL 570.1302(1). *Big L Corp*, 482 Mich at 1090 ("Although the Court of Appeals correctly stated that the . . . CLA . . . is to be liberally construed to effectuate the purposes of the act and that substantial compliance is sufficient, MCL 570.1302[1], it improperly relied on *Vugterveen*, rather than MCL 570.1302[1], for those rules of statutory interpretation."). Accordingly, *Vugterveen* remains good law.

information regarding the project, Rogers' name, address, and phone and fax numbers, and Mana's name and address. Virtually all of the information required by MCL 570.1110(4) was included in Rogers' statements; there was substantial compliance with the statutory requirement. The fact that the statements were not sworn does not call for a different result. In *Alan Custom Homes*, 256 Mich App at 510, this Court held that unverified statements were sufficient under the substantial compliance test. The Court stated, "That a statement is not sworn before a notary does not defeat the notice purpose of the statement. It still gives the owner notice of who the subcontractors are and the amount owing to each for the materials and labor supplied." *Id.*

Furthermore, Rogers supplied a formal sworn statement shortly after the litigation commenced. And while MCL 570.1110(9) and (10) indicate that an action to foreclose a construction lien cannot even be filed before a sworn statement is provided, the panel in *Alan Custom Homes*, 256 Mich App at 510-511, ruled:

> Application of the CLA's "substantial compliance" provision supports plaintiff's contention that its provision of unverified statements to the title company during construction and of a verified sworn statement to defendants before the summary-disposition hearing satisfied the notice requirement of MCL 570.1110[.] . . .
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> . . .
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> [W]e find that although plaintiff filed the present cause of action, including its claim for foreclosure of the lien, before giving defendants a verified sworn statement, plaintiff's provision of the verified sworn statement to them in February 2001, before the summary-disposition hearing was held, also constituted substantial compliance[.]

In sum, Rogers substantially complied with the sworn-statement requirements of MCL 570.1110. The trial court's ruling to the contrary was error. We do find it necessary to briefly address CSB and Mana's argument under MCL 570.1110(8), which provides:

> An owner, lessee, designee, mortgagee, or contractor may rely on a sworn statement prepared by a party other than himself or herself to avoid the claim of a subcontractor, supplier, or laborer unless the subcontractor, supplier, or laborer has provided a notice of furnishing as required under section 109 or unless the notice of furnishing is excused under section 108 or 108a.

Although Mack Allen testified that he relied on the sworn statements prepared by Ken McQuillan, which were proven to be false, we have already held that Rogers substantially complied with the notice-of-furnishing requirement set forth in MCL 570.1109. Accordingly, CSB and Mana's argument under MCL 570.1110(8) is unavailing. We would also note that the statements sent by Rogers to Mana, which statements were in substantial compliance with the sworn-statement requirements of MCL 570.1110, should have revealed to Mana the discrepancies in McQuillan's faulty sworn statements.

With respect to the waivers of lien allegedly executed by Carroll Rogers, we hold that the waivers cannot serve as a basis to invalidate Rogers' claim of lien. Carroll Rogers adamantly

testified that he did not sign the waivers, and both Allen and McQuillan testified that they did not observe Rogers executing the waivers. The trial court simply stated that Rogers "provided lien waivers to McQuillan with respect to services performed on the project[,]" effectively finding that Carroll Rogers had signed the waivers of lien. That said, the court never expressed that it found Carroll Rogers' testimony lacking in credibility. For our purposes, any lien waivers attributable to $71,950 in work performed by Rogers would be irrelevant, considering that it was stipulated that Rogers received $71,950 in payments. However, we must consider whether the construction lien amounting to the outstanding balance of $95,824 was waived by the series of waivers of lien purportedly executed by Carroll Rogers.

The record contains three "conditional" waivers from 2007, which are conditioned on "actual payment" of the amounts listed therein, i.e., $29,590, $7,520, and $10,665. Pursuant to MCL 570.1115(4), "[a] partial *conditional* waiver of lien or a full *conditional* waiver of lien shall be effective upon payment of the amount indicated in the waiver." (Emphasis added.) Given that conditional waivers are only effective when payment is actually made, the conditional waivers here cannot serve as a bar to Rogers' claim of lien, assuming they even pertained to the $95,824 in unpaid work performed by Rogers.

There are a series of five "unconditional" waivers covering the period of December 13, 2007, to June 2, 2008, with the final waiver reflecting an amount of $98,544, which appears to be a cumulative total. MCL 570.1115(2) provides that "[a] lien claimant who receives full payment for his or her contract shall provide to the owner . . . a full unconditional waiver of lien." Under MCL 570.1115(3), "[a] lien claimant who receives partial payment for his or her contract shall provide to the owner . . . a partial unconditional waiver of the lien for the amount which the lien claimant has received," if requested by the owner. There was uncontested evidence at trial that the $71,950 received by Rogers was paid as follows: $20,000 on March 20, 2008; $17,000 on June 12, 2008; $30,000 on July 1, 2008; and $4,950 on September 23, 2008. Accordingly, one must conclude that Carroll Rogers signed an "unconditional" waiver of lien that amounted to $98,544 on June 2, 2008, even though his company had only received $20,000 in actual payments by that date.

The final waiver of lien was executed in August 2008. It is a full "unconditional" waiver which indicated that the contract had "been fully paid and satisfied," with all lien rights against the property being waived and released. At that time, however, Rogers had only been paid $67,000. Furthermore, Carroll Rogers testified that he personally communicated to Mack Allen in August 2008 that over $90,000 was due and owing for services rendered by Rogers, and Allen himself testified about learning in August 2008 that Rogers had not been fully paid and was demanding payment. There is no dispute that Rogers never received full payment for its performance.

Moreover, Carroll Roger's name was spelled with only one "l" in the final waiver, which Carroll clearly included in all of his known signatures. One need not be a handwriting expert to seriously question the validity of a signature that misspells the name of the purported executioner. Three of the other waivers of lien also omitted the second "l" in Carroll's name. Further, a comparison of Carroll Rogers' known signatures on the contract and change orders and the signatures on the lien waivers reveals clear distinctions. See MRE 901(b)(2) (reflecting that handwriting comparisons and opinions are not the sole purview of experts). Additionally,

Ken McQuillan could not recall if he had prepared the waiver forms, could not recall if Carroll Rogers had signed the waivers, and could not recall if Carroll had delivered the waivers to McQuillan. Ken McQuillan testified that he did not even know how he came to receive the waivers, nor could he state from whom he received the waivers. Mack Allen testified as to his belief that Ken McQuillan had engaged in fraud during the project. In fact, Allen went to the local police department to report the matter. Allen testified:

> I stopped by the local [police] and gave them the scenario I was dealing with. I told them I had a contractor that, I think, you know, fraudulently took money from me and they told me that they had to have the guy who the fraud was perpetrated against to come in. At that time the only thing we knew was the fraud was the signatures and he didn't forge my signature, at least not at that point. So, the only signature I had was Mr. Rogers' signature as being forged.

Thus, Mack Allen himself indicated a belief that Carroll Rogers' signature was being forged by Ken McQuillan.

On this record, we are left with a definite and firm conviction that the trial court made a mistake in attributing the lien waivers to Carroll Rogers; the court's finding was clearly erroneous. We note that Mana does not even bother to address Rogers' argument regarding the validity of the lien waivers. Also, we are not persuaded by CSB's extremely cursory introductory argument that there was evidence to support the trial court's ruling. CSB then argues that, more importantly, the court did not rely on the lien waivers to invalidate the lien; rather, the court invalidated the lien due to the failure to otherwise comply with the CLA. We have already addressed and rejected these other reasons cited by the trial court. The court did posit that Mana relied on the lien waivers, but Mack Allen testified that he never saw the lien waivers until around the time of the litigation.

We appreciate that Mack Allen, based on McQuillan's sworn statements and the draws from Stearns Bank, had been of the reasonable belief that Rogers was being paid for its services. However, Mana's innocence cannot form the basis of invalidating Rogers' construction lien. In *Horton v Verhelle*, 231 Mich App 667, 677; 588 NW2d 144 (1998), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) (Court overruled numerous published opinions regarding technical summary disposition principle), this Court observed:

> The lien fund also produced evidence that agents of RBK and Clark Foundation executed full unconditional waivers of lien, but those agents submitted affidavits in which they denied having given those waivers to Hughes (and implied that they did not execute the waivers), thus creating a question of fact whether the waivers were valid. The lien fund conceded that the waivers may have been forged, but argued that the forgery did not affect the homeowners' right to rely on the waivers, which thus defeated the claimants' lien rights. There are no reported cases involving the effect of forged waivers. We find that the issue is analogous to that of the effect of forged deeds. The law is well settled that where a deed is forged, even innocent purchasers are in no better position with respect to title than if they had purchased with notice; there can be no such thing as a bona

> fide holder under a forgery whose good faith gives him any right against the party whose name was forged. Just as property owners cannot lose property rights to innocent purchasers under forged deeds, we find that lienholders cannot lose lien rights to innocent homeowners under forged waivers. [Citations omitted.]

As the waivers of lien here were unenforceable because they could not be attributed to Carroll Rogers, Rogers' construction lien was valid and properly recorded. Given our ruling, it is unnecessary to entertain the arguments that the waivers constituted inadmissible hearsay or that the trial court erred in excluding the report by Rogers' deceased handwriting expert.

Finally, with respect to priority, the trial court stated that CSB's "[m]ortgage has priority." It appears that the court made this finding predicated on its conclusion that Rogers' construction lien was invalid. However, we are uncertain of that conclusion, as the trial court's opinion is not entirely clear on the matter. Given the lack of clarity, we shall address the issue, which is easily disposed of considering the language in MCL 570.1119(3). In a very cursory argument presented below at summary disposition and following trial, and absent any citation of authority, CSB argued that its mortgage had priority because it was recorded before the claim of construction lien was recorded. CSB is correct as to the timing regarding when the mortgage and construction lien were recorded; the MainStreet Lender mortgage eventually assigned to CSB was recorded on September 22, 2008, and the construction lien was recorded on November 14, 2008. However, the date of recording the construction lien is ultimately irrelevant. MCL 570.1119(3) provides:

> 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*. [Emphasis added.]

An "actual physical improvement" is defined as an "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 record clearly and indisputably reflects that the first actual physical improvement made by Rogers was in October 2007, nearly a year before the mortgage was recorded. Accordingly, Rogers' construction lien has priority over CSB's mortgage. In sum, Rogers can proceed with its foreclosure action.

Affirmed in part, vacated and reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, Rogers is awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens