STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Augusta Apartments, LLC,
Defendant Below, Petitioner

vs) No. 11-0438 (Monongalia County No. 08-C-219)

Landau Building Company,
Plaintiff Below, Respondent

Laurita Excavating Inc.,
Defendant Below, Respondent

and

National City Bank,
Defendant Below, Respondent

FILED
October 21, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Augusta Apartments, LLC ("Augusta") appeals the circuit court's entry of judgment in favor of Respondents Landau Building Company ("Landau") and Laurita Excavating Inc. ("Laurita") against Augusta, following a bench trial in this mechanic's lien enforcement suit. The circuit court held that the deed of trust of Augusta's lender, National City Bank ("National City"), is junior in priority to the mechanic's liens of Landau and Laurita. Landau has filed a response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The dispute in this appeal arises from the construction of the Augusta Apartments, a student apartment complex in Morgantown, West Virginia. In October 2006, National City issued a commitment letter to petitioner, the owner of the project, agreeing to provide a

construction loan in the amount of $20,648,000 to finance the project. The Augusta Apartments project was part of a larger public-private partnership known as "The Square at Falling Run." The property on which the apartments were to be built was owned by McCoy 6 Apartments, LLC ("McCoy"), a business owned and controlled by the same family members who had formed the petitioner.

In November 2006, respondent Landau contracted with petitioner to serve as both the construction manager and general contractor of the project. Their contract had an arbitration clause. Respondent Laurita Excavating, a subcontractor, was hired to perform the excavation and site work on the project.

The circuit court concluded that Laurita had begun performing site preparation work prior to the December 13, 2006, closing between petitioner and National City. The circuit court specifically found that "[n]o later than 12-11-06, Laurita was on the Augusta site with heavy equipment leveling, clearing trees and brush, and hauling out mud and rocks to clear the site for the apartment buildings." The circuit court also found that: "[a]ccording to Laurita's and [petitioner Augusta's] records, Laurita was performing subcontract services for Landau to benefit the private portion of the Augusta Project on December 11, 12, 13 and 14, 2006." The circuit court also found that "[Petitioner Augusta] admitted that one of its representatives advised [National City] prior to closing that Landau had begun work on the project prior to December 13, 2006."

The closing on petitioner's purchase of the property where the Augusta Apartments were to be built took place on December 13, 2006. The circuit court found that the closing was held at a location near the Augusta construction site and that National City's representatives who were present at the closing "could have easily ascertained whether work had started on the Project . . . [however] representatives of [National City] did not view the construction site prior to or on the date of closing . . . ." National City recorded its deed of trust on December 14, 2006.

The circuit court found that sometime after closing, Landau signed a "Consent of Contractor" document which included the representation that the contractor, all subcontractors and materialmen "have no right, lien or interest (including, without limitations, any right to file mechanic's or materialmen's liens) in and to any of the property . . . ." The circuit court found that this representation was false as site preparation work had begun prior to the closing.

The apartment complex was substantially completed and opened for occupancy by August 2007, around the start of West Virginia University's 2007 Fall Semester. Laurita last worked on the project in October 2007. According to the petition, at some time late in the

2007 Fall semester, Landau contacted National City to indicate that it owed its subcontractors substantial sums of money and that petitioner owed Landau "millions of dollars." Because petitioner was now insolvent, Landau alleges that it asked that National City pay the additional money it claimed which National City refused.

In January of 2008, Landau finished working on the project and filed its Notice of Mechanic's Lien against petitioner in the amount of $2,283,317.90. The circuit court found that Landau's mechanic's lien was timely filed as required by West Virginia § 38-2-7. Similarly, Laurita filed its Notice of Mechanic's Lien against petitioner in January of 2008, in the amount of $383,284.27, and the circuit court found that its mechanic's lien was also timely filed.

Landau filed the instant action to enforce its mechanic's lien against petitioner, National City, and Laurita. Petitioner counterclaimed against Landau for breach of contract, alleging construction defects and unauthorized payments. Laurita filed a counterclaim against Landau and a cross-claim against petitioner. National City filed a cross-claim against petitioner and a third-party complaint against the owners of McCoy 6 Apartments, LLC, which sold petitioner the property on which the Augusta apartments were built. The circuit court stayed the action to allow Landau and petitioner to undergo arbitration, as required by their contract.

Landau and petitioner reached an agreement prior to an arbitration hearing. The arbitration panel issued a consent award based upon the agreement, which required petitioner to pay Landau $2,000,000. Included within this sum was the amount of Laurita's mechanic's lien.

Following the arbitration, National City and Laurita filed motions for summary judgment and Landau moved for partial summary judgment. The circuit court denied the motions based upon its findings that there were genuine issues of material fact as "the parties to this action differ considerably in their view of what date the privately funded portion of the construction began, whose lien has priority, and whether certain liens are valid. Landau and Laurita each maintain that their mechanic's liens are valid and enforceable while [National City] maintains they are not. [National City] argues that it holds a first lien on the Augusta property and that Landau and Laurita freely entered into lien waivers, making their mechanic's liens null and void. [National City] further contends that its lien is first because no work could have or did commence on the Augusta project until after National City recorded its deed of trust on the property [12-14-06] . . . . "

The circuit court held a bench trial in December of 2009. Petitioner filed for Chapter 11 bankruptcy in February of 2010.[1]

The circuit court entered a $ 2,000,000 judgment against petitioner in favor of Landau and a judgment in favor of Laurita against Landau for the amount of Laurita's lien. The circuit court held that National City's deed of trust is junior in priority to the mechanic's liens of Landau and Laurita. The circuit court found that the "Consent of Contractor"signed by Landau is not a waiver of the right to file a future lien. The circuit court further concluded that National City had no right to rely on Landau's representations because the Consent of Contractor was not executed until *after* the closing. The circuit court held that Landau and Laurita's liens also take priority over National City's lien because National City cannot claim equitable estoppel as a defense where the alleged misrepresentation occurred after the acts of reliance and National City had the means to discover whether construction had begun on the Augusta Apartments prior to closing. In entering the $2,000,000 judgment against petitioner, the circuit court took judicial notice that this was the amount of the arbitration award.

The circuit court ordered the appointment of a special commissioner for the purpose of ascertaining the liens against the real property at issue, selling that property, and satisfying from the proceeds of the sale, to the extent possible, the liens against that property after deducting the costs of the sale. The circuit court denied the post-trial motions filed by National City and petitioner.

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont,* 198 W.Va. 329, 480 S.E. 2d 538 (1996). Petitioner challenges the judgment order entered by the circuit court on several grounds as set forth below.

Petitioner argues that the circuit court erred in its finding as to when construction began for the purpose of determining priority of the interests of the parties. Petitioner argues that the type of work being performed prior to closing was mere preparatory work which should not qualify as the starting date for attachment of a mechanic's lien under West Virginia Code § 38-2-17. Similarly, petitioner argues that the circuit court erred in failing to give effect to the

[1] The bankruptcy stay was lifted to allow the circuit court to rule on the merits and for the purposes of this appeal.

"Consent of Contractor" document signed by Landau as there was testimony that it signified that "no work was to be performed and no intervening liens filed prior to the recordation of the bank's deed of trust." Petitioner argues that "[t]he Circuit Court's theory is simply that some moving of dirt began around December 12, 2006,[2] which pre-dated the loan closing, and therefore a mechanic's lien attached to the property on that date and took priority . . . ." The Court finds no merit in the petitioner's arguments. As there was substantial evidence which supported the circuit court's findings of fact on these issues, the Court concludes that the circuit court's determinations are not clearly erroneous.

Petitioner next makes a brief and conclusory argument that the circuit court ignored testimony regarding the intent of the parties regarding the priority of liens. The Court finds no merit in this argument.

Finally, petitioner argues that the circuit court erred in its finding as to the last dates of work of Landau and Laurita for purposes of determining if their mechanic's liens were timely filed. Following a review of the record and the arguments of the parties, the Court concludes that the circuit court's findings that the mechanic's liens of Landau and Laurita were timely filed was proper and should not be disturbed on appeal.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin

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[2]The circuit court actually found that the construction began no later than December 11, 2006.