[Cite as *Stottlemyer Hydromulching, Inc. v. Dearlove,* 2015-Ohio-750.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STOTTLEMYER HYDROMULCHING, INC.	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellant	:	
	:	
-vs-	:	Case No. 14-CA-00022
	:	
WILLIAM E. DEARLOVE, TRUSTEE, ET AL	:	
	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil appeal from the Perry County Court of Common Pleas, Case No. 13-CV-00311
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	February 27, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
DAVID LACKEY Scherner & Sybert LLC 153 South Liberty Street Powell, OH 43065	AMELIA BOWER David L. Van Slyke 300 East Broad Street, Ste. 590 Columbus, OH 43235

Gwin, P.J.

{¶1} Appellant appeals the July 22, 2014 judgment entry of the Perry County Court of Common Pleas granting appellant's motion for summary judgment in the amount of $4,283.45.

Facts & Procedural History

{¶2} Beginning in July of 2006, work began at Snug Harbor Development ("Snug Harbor"), a residential development project owned by Triglyph Holdings, LLC ("Triglyph"). Triglyph did not record a notice of commencement for the Snug Harbor project. On April 6, 2007, Triglyph filed a plat for the Snug Harbor project, subdividing it into sixty-six separate lots. Triglyph hired appellant Stottlemyer Hydromulching, Inc. to work on the Snug Harbor project in Spring of 2007. The final sub-contract specified that the work would be substantially complete on or before August 4, 2007. Final punchlist work was completed by September 1, 2007.

{¶3} Triglyph failed to make timely payments to appellant. Accordingly, appellant filed an affidavit for mechanics' lien with the Perry County Recorder on October 24, 2007. The lien contains a metes and bounds description that describes the entire Snug Harbor project. Appellees William Dearlove, Trustee, and Marion Dearlove, Trustee, acquired title to Lot 43 in Snug Harbor in a deed from Triglyph dated November 1, 2007 and recorded on November 16, 2007. The title company that handled the closing failed to notice appellant's lien and allowed Triglyph to sell the property without requiring payment to be made for the lien.

{¶4} On August 27, 2013, appellant filed a complaint for foreclosure of mechanics' lien against appellees. Also on August 27, 2013, appellant filed a judicial

report, which included: multiple deeds regarding the Snug Harbor project; a recorded affidavit for mechanics' lien by Redskin Logistics, Ltd. stating they furnished material or performed labor or work in furtherance of improvements starting on July 15, 2006 and were due $105,693.40; a partial release of the Redskin Logistics mechanics' lien; and a recorded affidavit for mechanics' lien by appellant stating it performed work and labor and/or provided materials for the construction of and in furtherance of certain improvements pursuant to a contract with Triglyph for work beginning May 15, 2007 and ending September 1, 2007.

{¶5} After receiving an extension of time to plead, appellees filed an answer denying liability. On January 29, 2014, appellees filed a motion for summary judgment. Appellees did not dispute that Triglyph did not pay appellant a pro-rata share of the mechanics' lien at the time of the sale to appellees. Appellees also admitted that they owe appellee the sum of $4,283.45 for work done by appellant on Lot 43 in Snug Harbor. However, in their motion, appellees sought to limit the amount to which appellant could enforce its mechanics' lien to one sixty-sixth of the total amount due, or $4,283.45.

{¶6} On January 30, 2014, appellant filed its own motion for summary judgment and response to appellees' motion for summary judgment. In its motion, appellant stated that the motion was supported by the deposition of George Stottlemyer ("Stottlemyer"), the affidavit of Marty Finta ("Finta"), the President of Triglyph, and the documents in the preliminary judicial report, which were incorporated by reference. Finta's affidavit states that Snug Harbor operated as an entire plant or concern; work to be done by appellant covered all of Snug Harbor and was meant to benefit all of Snug

Harbor, including each lot; the contracts between Triglyph and appellant were spelled out in five separate sub-contracts and the intent of the parties was to treat the work as being performed under one general subcontract, that work proceeded based upon that intent and was billed based upon that intent and was paid for based upon that intent; the affidavit for mechanics' lien recorded by appellant accurately described the dates of work by appellant and the amounts due to appellant; appellant performed work on the last date of work referenced in the lien at his request and in furtherance of the contract; and that all of the information contained within the lien is accurate. Appellant argued that it was entitled to recover from appellees the entire $82,000 balance owed under the lien.

{¶7} On June 4, 2014, the trial court entered a judgment entry granting appellant's motion for summary judgment in the amount requested by appellees of $4,283.45. On July 22, 2014, the trial court entered a judgment entry and decree of foreclosure.

{¶8} Appellant appeals the July 22, 2014 judgment entry of the Perry County Court of Common Pleas and assigns the following as error:

{¶9} "I. THE TRIAL COURT ERRED IN ITS ENTRY WHEN IT CONCLUDED THAT REASONABLE MINDS COULD COME TO ONE CONCLUSION, AND THAT CONCLUSION WAS THAT STOTTLEMYER HYDROMULCHING, INC. COULD ONLY ENFORCE $4,283.45 OF ITS $82,000.00 MECHANICS' LIEN AGAINST THE DEARLOVES' PROPERTY."

Summary Judgment

{¶10} Civ.R. 56 states, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶11} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶12} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶13} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrates absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist. 1991).

I.

{¶14} The primary issue in this case is whether appellant may recover the entire $82,000.00 balance owed under the lien from appellees when only a portion of the labor and materials that make up that balance were supplied to their property. Appellees argue that the lien can only be enforced either to the extent that labor and materials were provided to their lots or on a pro-rata basis. Appellants argue that, pursuant to R.C. 1311.08 and R.C. 1311.03 and when the effective date of the mechanics' lien is

prior to the date that the project was subdivided into lots, appellant is entitled to the full $82,000 balance.

{¶15} R.C. 1311.08 provides that:

> Where an improvement consists of two or more buildings together, situated on the same lot or upon contiguous or adjacent lots, or of separate buildings upon contiguous or adjacent lots, or where work or labor has been performed or material has been furnished for improvements which are located on separate tracts or parcels of land but operated as an entire plant or concern, and erected under one general contract, the lien for the labor or work performed or material furnished attaches to all such improvements, together with the land upon, around, or in front of which such labor or work is performed or material is furnished * * * it is not necessary to file a separate lien for each improvement.

{¶16} In addition, R.C. 1311.03 allows for liens to be filed against properties that abut certain areas where work is done and states that:

> Any person who performs labor or work or furnishes material, for the construction, alteration, or repair of any street, turnpike, road, sidewalk, way, drain, ditch, or sewer by virtue of a private contract between the person and the owner, part owner, or lessee of lands upon which the same may be constructed, altered, repaired, or of lands abutting thereon, or as subcontractor, laborer, or material supplier, performs labor or work or furnishes material to such original contractor or to any subcontractor in carrying forward or completing such contract, has a lien for the payment

> thereof against the lands of the owner, part owner, or lessee, upon which the street, turnpike, road, sidewalk, way, drain, or sewer is constructed or upon which any street, turnpike, road, sidewalk, way, drain, ditch, or sewer abuts * * *.

{¶17} Appellees argue that R.C. 1311.03 is not applicable because the separate sub-contracts in this case cannot be treated as one contract. We first note that appellees failed to raise this issue at the trial court level and thus it is waived on appeal. *The Strip Delaware, LLC v. Landry's Restaurants, Inc.*, 5th Dist. No. 2010CA00316, 2011-Ohio-4075. Further, in Finta's affidavit, he states that the intent of the parties was to treat the work as being performed under one general contract and Stottlemyer testified that the contracts were for the entire project. While the terms of the contract were set forth in several proposals, the improvements constituted one project. Appellees failed to submit any Civil Rule 56 evidence to rebut these assertions and thus we find the separate proposals were treated as one contract in this case.

{¶18} Appellees further argue that R.C. 1311.08 is not applicable because there is no evidence appellant worked on streets, turnpikes, ways, drains, ditches, or sewers. However, Stottlemyer testified several times in his deposition that appellant provided work and materials for temporary roads or streets and also graded and seeded all right-of ways. Additionally, in appellees' own motion for summary judgment, they state that appellant completed work on a stone temporary access road. Thus, R.C. 1311.08 is applicable in this case.

{¶19} While both R.C. 1311.03 and R.C. 1311.08 provide that one lien can be filed against multiple lots, neither statute indicates whether a lien claimant is limited to

an apportioned amount of the lien or the entire amount of the lien. Appellees argue that appellant can only enforce the lien against their property to the extent that the labor and materials specifically benefited appellees' lot. Appellant argues it can enforce the entire amount of the lien against appellees.

{¶20} Ohio's mechanics' lien statutes create rights in derogation of the common law, and are generally strictly construed as to the question of whether a lien attaches. *Crock Construction Co. v. Stanley Miller Construction Co.*, 66 Ohio St.3d 588, 613 N.E.2d 1027 (1993).

{¶21} In this case, work at Snug Harbor began on July 15, 2006, as evidenced by the mechanics' lien Redskin Logistics recorded on January 22, 2007. At that time, the Snug Harbor project was described by a metes and bounds legal description of approximately 113.63 acres. Snug Harbor was not subdivided into lots until April 6, 2007. Pursuant to R.C. 1311.13(A)(1), "all liens under sections 1311.01 to 1311.22 of the Revised Code for labor or work performed or materials furnished to the same improvement prior to the recording of the notice of commencement * * * are effective from the date the first visible work or labor is performed or the first materials are furnished * * *." Further, R.C. 1311.13(E)(1) provides that these liens which have the effective date as listed in R.C. 1311.13(A)(1) "shall be preferred * * * to all other liens * * * which either shall be given or recorded subsequent * * *." Triglyph did not record a notice of commencement for the Snug Harbor project. Thus, appellant's lien had the effective date of July 15, 2006, when the project was approximately 113.63 acres and not subdivided into lots.

{¶22} When interpreting a statute, a court's principal concern is the legislative intent in enacting the statute. *State v. S.R.*, 63 Ohio St.3d 590, 589 N.E.2d 1319 (1992). It is a fundamental rule under Ohio law that a court must first look to the statute's language itself to determine the legislative intent. *Id.* In interpreting a statute, "words and phrases shall be read in context and construed according to the rules of grammar and common usage * * *." *Independent Insurance Agents of Ohio, Inc. v. Fabe*, 63 Ohio St.3d 310, 587 N.E.2d 814 (1992). Courts do not have the authority to ignore the plain language of a statute under the guise of statutory interpretation, but must give effect to the words used. *State ex rel. Fenley v. Ohio Historical Society*, 64 Ohio St.3d 509, 597 N.E.2d 120 (1992).

{¶23} "Whenever possible, well-recognized principles of statutory construction requires us to read 'all statutes pertaining to the same general subject matter * * * in pari materia, and to construe potentially conflicting statutory provisions so as to give effect to both." *Perrysburg Twp. v. Rossford Arena Amphitheater Auth.*, 175 Ohio St.3d 549, 2008-Ohio-363, 888 N.E.2d 440, citing *Zweber v. Montgomery County Bd. of Elections*, 2nd Dist. No. 19305, 2002 WL 857857 (April 25, 2002). "In pari materia" is a rule of statutory construction – the meaning of which is that the General Assembly, in enacting a statute, is assumed to have been aware of other statutory provisions concerning the subject matter of the enactment." See *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 404 N.E.2d 159 (1980). Therefore, when statutes are construed together, full application must be given to both statutes unless they are irreconcilable and in hopeless conflict. *Hughes v. Ohio Bur. Of Motor Vehicles*, 79 Ohio St.3d 305, 1997-Ohio-387, 681 N.E.2d 430 (1997).

{¶24} The Ohio Legislature chose to address the apportionment issue with regards to mechanics' liens recorded against condominium projects in R.C. 5311.13(D) which provides that if a lien or encumbrance arises in two or more units,

> the proportionate amount of the obligation secured or evidenced by the lien or encumbrance that is attributable to the estate or interest in any unit shall be in the ratio that the undivided interests in the common elements appurtenant to that unit bears to the total undivided interests in the common elements appurtenant to all units. An estate or interest in a unit may be released and discharged from the operation of the lien or encumbrance, in the same manner and to the same extent that a lien or encumbrance is released and discharged with respect to any separate parcel of real estate, by payment to the lienholder or encumbrancer of the proportionate amount of the obligation secured or evidenced by the lien or encumbrance that is attributable to the estate or interest.

{¶25} R.C. 5311.13(D) thus specifically provides that if a mechanics' lien is recorded against multiple units or lots of a condominium project, the lien will attach pro rata to each unit and the enforcement of mechanics' liens is limited to the proportionate amount attributable to each condominium interest. However, R.C. 1311.03 and R.C. 1311.08, the statutes at issue in this case, do not contain any language regarding apportionment or liens attaching pro rata to each lot or unit. Because R.C. 1311.03, R.C. 1311.08 and R.C. 5311.13(D) address the applicability of mechanics' liens to multiple lots or units, they must be read in pari materia and harmonized together.

{¶26} Accordingly, because the mechanics' lien at issue has an effective date prior to subdivision into lots and reading R.C. 1311.03, R.C. 1311.08, and R.C. 5311.13(D) in pari materia, we find the trial court erred in concluding that appellant could only enforce $4,283.45 of its $82,000.00 mechanics' lien against appellees.

{¶27} Further, we find the cases cited by appellees to be distinguishable from the instant case. In *International Refractory Services Corp. v. Woodmen of the World Life Ins. Society*, the Ninth District Court of Appeals stated that though they accepted the Ohio Supreme Court's holding that if a building is situated on two contiguous lots and work is done on part of the building that is on one of the lots, the lien can attach to both lots upon which the building is located, they declined to extend the principle to cover a situation where the work did not occur on the lot described in the affidavit and was situated across the street from the lots contained in the affidavit. 68 Ohio App.3d 513, 589 N.E.2d 79 (9th Dist. 1990). Unlike in *International Refractory*, in this case, the correct parcel of land was described in the lien and the entire Snug Harbor project was operated as an entire plant or concern. Further, if the requirements of R.C. 1311.03 or R.C. 1311.08 are met, a lien can attach to parcels of land where work was not performed and materials not furnished.

{¶28} In *I. Koblitz & Son v. Duffie*, the contract was not one general contract like in this case and covered multiple lots within a city as opposed to work performed on lots within a subdivision. 33 Ohio C.D. 642, 1906 WL 1220 (June 8, 1906). In that case, R.C. 1311.08 would not apply as it does in this case. Finally, in *Botzum Bros. Co. v. Ohio State Bank & Trust Co.*, the court held that the material supplier was only entitled to a lien for a proportionate share of the material for each lot because the materials

were sold generally for use anywhere the contractor pleased. 9th Dist. Summit No. 814, 1924 WL 2563 (1924). However, in this case, the materials were furnished pursuant to an understanding that they were to be applied for the improvement in the subdivision for which the lien is sought. In addition, pursuant to R.C. 1311.2(B), delivery of materials to the site of the improvement creates a conclusive presumption that the materials were used in the course of the improvement or incorporated in it.

{¶29} Appellees further rely upon several cases from other states to support their position. However, as noted above, mechanics' liens are creatures of statute and are in derogation of the common law. *Crock Construction Co. v. Stanley Miller Construction Co.*, 66 Ohio St.3d 588, 613 N.E.2d 1027 (1993). There is no evidence that the states cited in appellees' cases have statutes identical or substantially similar to those in Ohio.

Civil Rule 56 Evidence

{¶30} Appellees also argue there is no Civil Rule 56 evidence to support appellant's motion for summary judgment and that the copy of the mechanics' lien attached to appellant's motion for summary judgment was not proper Civil Rule 56 evidence.

{¶31} We first note that appellees failed to raise either of these issues at the trial court level. With regards to the evidentiary value of the copy of the mechanics' lien, if a party does not object to Rule 56 evidence in the trial court, the issue is waived on appeal. *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3202. Further, as to appellees' argument that there is no Civil Rule 56 evidence to support appellant's motion, a party cannot assert new arguments for the

first time on appeal and, a litigant who had the opportunity to raise an issue in the trial court, but declines to do so, waives the right to raise that issue on appeal. *The Strip Delaware, LLC v. Landry's Restaurants, Inc.*, 5th Dist. No. 2010CA00316, 2011-Ohio-4075. In addition, in both their response to appellant's motion for summary judgment, and in their own summary judgment motion, appellees stipulated that they owe appellant a pro rata share of the lien amount.

{¶32} Even if appellees' argument was not waived, we find that there was Civil Rule 56 evidence to support appellant's motion for summary judgment. Appellant's motion was supported by Finta's affidavit, stating that all the information contained in the lien is accurate and affirmed the dates of work and amounts due as listed in the mechanics' lien were accurate. Further, appellant's motion specifically states that the deposition of Stottlemyer and the judicial report were incorporated by reference. The judicial report contains the notarized affidavit for mechanics' lien as an attached exhibit that indicates it was recorded on October 24, 2007 with the Perry County Recorder. Accordingly, we find appellees' argument that there was no Civil Rule 56 evidence to support appellant's motion for summary judgment to be not well-taken.

{¶33} Based on the foregoing, we sustain appellant's assignment of error. The July 22, 2014 judgment entry of the Perry County Court of Common Pleas is reversed and remanded for further proceedings in accordance with this opinion.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur