[Cite as *Great Lakes Petroleum Co. v. Jayco, Inc.*, 2015-Ohio-1034.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101795

GREAT LAKES PETROLEUM CO.

PLAINTIFF-APPELLANT

vs.

JAYCO, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-761684

BEFORE: Celebrezze, A.J., Jones, J., and Boyle, J.

RELEASED AND JOURNALIZED: March 19, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Great Lakes Petroleum Co. ("Great Lakes"), brings this appeal from the grant of summary judgment in favor of VF Holdings, Ltd. ("VF Holdings") and JSN Holdings, Ltd. ("JSN Holdings").[1] Great Lakes sought to enforce a mechanic's lien filed against real property owned by VF Holdings. The trial court found no valid mechanic's lien existed and even if a lien existed it was not enforceable against these entities. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Great Lakes sold diesel fuel to Jayco, Inc. ("Jayco") on a number of occasions prior to and during the time frame involved in this dispute. Great Lakes asserted that an alter ego of Jayco, Bulldog Asset Recovery and Collection ("Bulldog"), and others used this fuel to make improvements to property owned by VF Holdings. VF Holdings and Bulldog entered into a ground lease on February 21, 2011. Prior to this, an "Access and Removal Agreement" was entered into on January 4, 2011, so Bulldog could conduct tests to determine if the property was suitable for Bulldog's business. Bulldog leased 20 of 48 acres of unimproved "brown field" owned by VF Holdings in order to excavate and extract steel mill slag that was buried on the property. Bulldog would separate the magnetic metallic material from the non-magnetic material for sale. The remainder material was to be reinterred on the premises and the ground leveled. Bulldog would also extract slag from other locations and bring it to the property for processing. This additional material was to be removed by the conclusion of the lease. As part of the requirements for permits for excavation, the city of Independence required that landscape mounds be constructed along the portion of the property adjacent to the Cuyahoga

[1] JSN Holdings, Ltd. has no ownership interest in the property at issue and took no part in any transaction. It shares common ownership with VF Holdings.

River. This condition was put into the lease agreement requiring Bulldog to construct the mounds. The lease agreement also included a provision that called for Bulldog to grade and level the entire leased premises at the conclusion of the lease.

{¶3} Great Lakes supplied fuel to Jayco numerous times during the lease period, as demonstrated by invoices attached to the complaint. It claims Jayco did not pay for $95,459.33 worth of fuel delivered to the leased premises that was used by Bulldog for improvements made to the land.

{¶4} On June 7, 2011, Great Lakes recorded an affidavit of mechanics' lien[2] purporting to attach to all 48 acres owned by VF Holdings even though only 20 acres of those lands were subject to the lease. It also filed an amended affidavit on June 21, 2011, to include additional property. Great Lakes filed an action against VF Holdings, Bulldog, Jayco, and other entities it claims are related to Jayco, including The Scrap Yard, L.L.C. ("Scrap Yard"), and Allen Youngman.[3] Great Lakes sought payment on an account from Jayco and the related companies and sought to foreclose on the property owned by VF Holdings. Great Lakes filed for summary judgment against Jayco and the related companies on October 17, 2012. VF Holdings and JSN Holdings filed for summary judgment on December 6, 2012. Great Lakes filed its own motion for summary judgment on December 5, 2012, as to its claims against VF Holdings as well as a motion in opposition.

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[2]R.C. 1311.06 refers to an "affidavit of mechanics' lien" while the majority of the case law dealing with these liens uses "mechanic's lien." R.C. 5309.57 also calls such liens "mechanic's liens."

[3] These additional parties were added in a later amended complaint.

{¶5} A magistrate was assigned to hear the case. The magistrate issued a decision granting Great Lakes' motion for summary judgment in part against Jayco and the related companies. The magistrate also issued a decision granting VF Holdings' motion for summary judgment and denied Great Lakes' motion, finding that Great Lakes had not demonstrated that a valid mechanic's lien existed that would attach to VF Holdings' property. Great Lakes filed objections to the magistrate's decision. With an exception not relevant here, the trial court adopted the magistrate's decision and granted VF Holdings' motion for summary judgment. Great Lakes appeals from that decision assigning four errors:

> I. The trial court committed reversible error by failing to consider appellant's evidence when granting appellee's motion for summary judgment and failing to grant appellant's motion for summary judgment.
>
> II. The trial court committed reversible error in granting appellee's motion for summary judgment and denying appellant's motion for summary judgment in reliance on a finding of no improvement to the real property.
>
> III. The trial court committed reversible error in granting appellee's motion for summary judgment and denying appellant's motion for summary judgment in reliance on a finding that appellant's mechanic's lien was void for including excess real property.
>
> IV. The trial court committed reversible error in granting appellee's motion for summary judgment and denying appellant's motion for summary judgment in reliance on a finding that as a matter of law, appellant's mechanic's lien would only attach to a leasehold.

II. Law and Analysis

A. Summary Judgment

{¶6} This court reviews the grant of summary judgment de novo. *Snyder v. Ohio Dept. of Natural Resources,* 140 Ohio St. 3d 322, 2014-Ohio-3942, 18 N.E.3d 416, ¶ 2. Civ.R. 56(C)

provides that before summary judgment may be granted, it must be determined that no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. This occurs when it appears from the evidence that reasonable minds can come to but one conclusion, viewing such evidence most strongly in favor of the party the nonmoving party, that the moving party is entitled to judgment. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

B. Mechanic's Lien

{¶7} The trial court found that a valid mechanic's lien did not exist because Great Lakes failed to show that the fuel delivered was used for improvements made to the land. This court agrees with that determination.

{¶8} A supplier of goods or services that are incorporated or used to make improvements to lands may seek a statutory lien on the premises when not compensated for such goods or services. R.C. 1311.02 set forth this statutory lien:

> Every person who performs work or labor upon or furnishes material in furtherance of any improvement undertaken by virtue of a contract, express or implied, with the owner, part owner, or lessee of any interest in real estate, or the owner's, part owner's, or lessee's authorized agent, and every person who as a subcontractor, laborer, or material supplier, performs any labor or work or furnishes any material to an original contractor or any subcontractor, in carrying forward, performing, or completing any improvement, has a lien to secure the payment therefor upon the improvement and all interests that the owner, part

owner, or lessee may have or subsequently acquire in the land or leasehold to which the improvement was made or removed.

{¶9} R.C. 1311.12(A) provides,

> [a] mechanics' lien for furnishing materials arises under sections 1311.01 to 1311.22 of the Revised Code only if the materials are:
>
> (1) Furnished with the intent, as evidenced by the contract of sale, the delivery order, delivery to the site by the claimant or at the claimant's direction, or by other evidence, that the materials be used in the course of the improvement with which the lien arises;
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> (2) Incorporated in the improvement or consumed as normal wastage in the course of the improvement;
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> * * *
>
> (4) Used for the improvement or for the operation of machinery or equipment used in the course of the improvement and not remaining in the improvement, subject to diminution by the salvage value of those materials; or
>
> (5) Tools or machinery used on the particular improvement, subject to division (C) of this section.

{¶10} "The character, operation, and extent of a statutory lien must be ascertained from the statute creating and defining it. Such statute cannot be amended or extended by judicial construction to meet a situation not provided for nor contemplated thereby." *Mahoning Park Co. v. Warren Home Dev. Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924), paragraph one of the syllabus.

{¶11} Great Lakes points to the lease agreement and argues that its requirements — that Bulldog grade and level areas disturbed by excavation, remove steel mill slag that it brings onto the property, level and grade the property upon exit, and construct screening mounds required by

a municipal authority to allow the excavation of slag — constitute a contract for improvements to the land. An improvement is defined in R.C. 1311.01(J) to include

> constructing, erecting, altering, repairing, demolishing, or removing any building or appurtenance thereto, fixture, bridge, or other structure, and any gas pipeline or well including, but not limited to, a well drilled or constructed for the production of oil or gas; the furnishing of tile for the drainage of any lot or land; the excavation, cleanup, or removal of hazardous material or waste from real property; the enhancement or embellishment of real property by seeding, sodding, or the planting thereon of any shrubs, trees, plants, vines, small fruits, flowers, or nursery stock of any kind; and the grading or filling to establish a grade.

{¶12} While some of the items Bulldog was required to do under the ground lease fit within the definition of improvements, there is no indication that this was contemplated by Great Lakes, VF Holdings, or Bulldog. Here, Great Lakes supplied fuel to Jayco that Bulldog used in its business. Jayco and Great Lakes had an existing relationship where Great Lakes supplied fuel to Jayco so that Jayco could extract steel mill slag in other locations. The fuel deliveries made during the time frame alleged by Great Lakes to be covered in the affidavit of lien were no different.

{¶13} Accepting Great Lakes' argument that the grading of the entire demised property as set forth in Section 5, Clause v of the lease could be considered a contract for improvements, this provision required such work at the completion of the three-year lease. However, Bulldog was evicted from the premises before the termination of the lease and before the property was leveled and graded. In fact, the affidavit of lien was filed only four months after the effective date of the lease.

{¶14} Section 5's first unnumbered paragraph called for Bulldog to "cover the replaced material [non-magnetic fill material that is returned to the property] with clean soil and [to] grade the replacement area to grades established by the Lessor." Both sides admit that a small amount

of grading was done at the site. This paragraph requiring the restoration of damage done to the property as a result of excavation is not an improvement to the land. It is a remedial measure to return the property to approximately the same condition as it existed prior to the lease. This does not constitute an improvement within the meaning of R.C. Chapter 1311 et seq.

{¶15} The landscape mounds were required by municipal officials in order for Bulldog to excavate on the premises. "[A] mechanic's lien attaches only to the interest of the person for whom the improvement is contracted to be made." *Romito Bros. Elec. Constr. Co. v. Frank A. Flannery, Inc.*, 40 Ohio St.2d 79, 81-82, 320 N.E.2d 294 (1974). The landscaping mounds were not required by VF Holdings, but were a condition of permitting the excavation by a local municipality, and the lease placed the burden of construction on Bulldog. This cannot be construed as a contract for improvements.

{¶16} The lease does not provide for improvements as contemplated in the mechanic's lien statute that were undertaken in this case. The grading, as set forth in the lease, was to cure damage of the leased premises that resulted from Bulldog's excavation of slag. The grading and leveling of the leased premises at the termination of the lease did not occur because the lease was for three years and the mechanic's lien was filed the same year that the lease began.

{¶17} The fuel provided went to excavation equipment that Bulldog used in its business of extracting steel mill slag. As such, no valid mechanic's lien can attach on the fee simple possessed by VF Holdings.

{¶18} VF Holdings also argues the affidavit of mechanic's lien is overbroad and invalid because, at the time it was filed, it included property not subject to the lease or any purported improvements. *See Internatl. Refractory Serv. Corp. v. Woodmen of the World Life Ins. Soc.*, 68 Ohio App.3d 513, 589 N.E.2d 79 (9th Dist.1990). It also argues that the affidavit does not

properly state an amount due because Great Lakes improperly tacked separate fuel deliveries together to shoehorn all the deliveries into the 75-day window Great Lakes had to file a mechanic's lien. Great Lakes also included in the amount owed charges for fuel delivered to an address some 70 miles away from the leased premises without explanation.[4] Because this court has already found no valid mechanic's lien existed on VF Holdings' interest, these arguments need not be addressed.

III. Conclusion

{¶19} Great Lakes overreached in attempting to claim a mechanic's lien on property owned by VF Holdings. Great Lakes delivered fuel to its client, as it had in the past, so the client could engage in the excavation of steel mill slag. Summary judgment was appropriately granted in VF Holdings' favor.

{¶20} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

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[4]VF Holdings also argues that any fuel deliveries Great Lakes made to Jayco does not involve its tenant, Bulldog. However, construing the evidence in favor of Great Lakes, Bulldog and Jayco are one and the same for purposes of summary judgment given the testimony by Youngman as to their operations and mingling of assets, revenues, and liabilities.

LARRY A. JONES, SR., J., and
MARY J. BOYLE, J., CONCUR