

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**JET STEEL, INC, and
LABELLE ELECTRIC SERVICES, INC,
Plaintiffs,**

v.

**Case No. 15-147357-CB
Hon. James M. Alexander**

**BARNETT INDUSTRIAL PROPERTIES, LLC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant Hunting National Bank’s motion for summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

Plaintiffs brought this case to foreclose construction liens on property located at 51100 Pontiac Trail in Wixom. Defendant Barnett Industrial owns the property and contracted with Defendant TMP Group to construct a warehouse and office addition on the property.

Several parties now claim construction liens on the property based on work they performed in furtherance of the project. Huntington now moves for summary disposition under MCR 2.116(C)(10) – claiming that, under MCL 570.119(4), its prior recorded Mortgage has priority over all of the alleged construction liens on the Property. As a result, Huntington seeks a declaration of the same and its dismissal from this lawsuit.

A (C)(10) motion tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The

opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

In support of its motion, Huntington claims that Barnett granted it a Mortgage on the property on August 5, 2010. This Mortgage was recorded on August 16, 2010. On November 20, 2013, the Mortgage was amended to increase the amount of debt secured by the Mortgage, and this Amended Mortgage was recorded on December 11, 2013.

Also on November 20, 2013, Barnett executed a Notice of Commencement which gave notice that work was about to commence on the property. This Notice was recorded on December 11, 2013. And Huntington argues that no work commenced until well after this date.

In support, Huntington cites to: (1) the April 14, 2014 contract entered between Barnett and its general contractor, TMP Group; and (2) the first building permit issued by the City of Wixom (dated June 16, 2014). Specifically, Huntington claims that no work actually began until after the June 16, 2014 building permit.

As stated, Huntington claims priority over all construction liens under The Construction Lien Act, at MCL 570.1119(4), which provides:

A mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act. The priority of the mortgage shall exist as to all obligations secured by the mortgage except for indebtedness arising out of advances made subsequent to the first actual physical improvement.

The Act, at MCL 570.1103(1), defines “actual physical improvement” as:

the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. Actual physical improvement does

not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature. Actual physical improvement does not include supplies delivered to or stored at the real property.

Huntington claims that it is undisputed that no actual physical improvements to the property occurred until well after its December 2013 amended mortgage was recorded. And as a result, it is entitled to a priority determination and dismissal from this lawsuit.

In its response, Jet Steel essentially argues that summary disposition is premature because discovery is not set to close until February 8, 2016. This matters, Jet Steel argues, because Barnett was apparently “planning this project” with another general contractor (ACS Build) from May 2013 through November 2013. And, therefore, Jet Steel claims that it cannot know if any actual physical improvements occurred on the property.

Indeed, summary disposition under (C)(10) is usually premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

But Jet Steel acknowledges that it “does not have information that any ‘first actual physical improvement’ to the Project occurred prior to the bank’s December 2013 recording of its Amended Mortgage.” Despite this, it still claims that because Barnett was working with ACS Build in **the planning stages** of the project, discovery may still reveal that some physical improvements might have been made.

In support, Jet Steel attaches several emails and correspondence related to the planning of the project. But none of these communications support the conclusion that any actual physical improvements were done. In fact, the attached communication dated closest to Huntington’s December 11, 2013 recording of the Amended Mortgage appears to support the notion

construction had not yet begun. In a November 13, 2013 email, the City of Wixom writes: “[i]f approved, once you establish escrow & submit drawings for review your construction will be able to commence.” In other words, work had not yet commenced because some preconditions to the same still existed.

Rather than present any **evidence** in support of its claim that “actual physical improvements” may have occurred before Huntington recorded its Amended Mortgage, Jet Steel simply offers allegations or speculation. The Michigan Court of Appeals has held that:

A party opposing a motion brought under C(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. . . . [W]here the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993) (internal citations omitted).

As a result, the Court concludes that Jet Steel fails to present any evidence contradicting Huntington’s claims, and as a result fails to establish a question of fact regarding Huntington’s entitlement to judgment as a matter of law.

The Court further finds that Jet Steel has failed to establish that additional discovery stands a fair chance of uncovering factual support for its bare allegations.

Jet Steel admits that it has no information that any actual physical improvements were made prior to the recording of Huntington’s Amended Mortgage. Further, Jet Steel only alleges that Barnett was in **the planning stages** with another general contractor prior to December 2013.¹ As specifically provided in the Act, planning does not amount to “actual physical improvement.”²

¹ Jet Steel’s reliance on *Michigan Pipe & Valve-Lansing, Inc v Hebelor Enterprises, Inc*, 292 Mich App 479; 808 NW2d 323, 325 (2011) is misplaced because, in that case, an “actual physical improvement” predated the recording

For all of the foregoing reasons and viewing all evidence in the light most favorable to the non-movant, the Court finds that there are no material questions of fact in dispute and Huntington is entitled to judgment as a matter of law. Therefore, the Court GRANTS Huntington's motion for summary disposition under (C)(10).

The Huntington National Bank's Amended Mortgage has priority over all claimed construction liens on the Property.

The Huntington National Bank is hereby DISMISSED from this case.

IT IS SO ORDERED.

January 11, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

of a mortgage lien by two days. In this case, there is no specific allegation or evidence of any such improvement – only evidence of planning.

² “Actual physical improvement does not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature.” MCL 570.1103(1).