NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2714-09T1

MARONE CONTRACTORS, INC.,

Plaintiff-Appellant/
Cross-Respondent,

v.

PHILLIP O. COLVIN, DONNA L.
COLVIN,

Defendants-Respondents/
Cross-Appellants,

and

DEAN C. SWIFT, JR.,
and LYNN L. SWIFT,

Defendants-Respondents.

Submitted May 18, 2011 - Decided July 14, 2011

Before Judges Cuff and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-389-09.

Madden & Madden, P.A., attorneys for appellant/cross respondent (Patrick J. Madden, on the brief).

Archer & Greiner, attorneys for respondents/ cross-appellants Phillip O. Colvin and Donna L. Colvin (Jerrold S. Kulback and Benjamin D. Morgan, on the brief).

Dembo & Saldutti LLP, attorneys for respondents Dean C. Swift, Jr., and Lynn L. Swift (Anne S. Cantwell, on the brief).

PER CURIAM

Plaintiff Marone Contractors, Inc., a concrete contractor, sought to enforce construction liens against properties owned by defendants Phillip and Donna Colvin (the Colvins) and Dean and Lynn Swift (the Swifts)[1] pursuant to the New Jersey Construction Lien Law (CLL), N.J.S.A. 2A:44A-1 to -38. Plaintiff appeals from the grant of summary judgment to defendants based on the one-year statute of limitations established by N.J.S.A. 2A:44A-14a(1), and a general release plaintiff gave in a bankruptcy matter where defendants had been joined as third-party defendants. The Colvins cross-appeal from the denial of their motion for attorneys' fees and costs. We affirm the grant of summary judgment to defendants, reverse the denial of attorney's fees and costs, and remand for consideration of the amount of attorneys' fees and costs to award to the Colvins' counsel.

[1] We shall sometimes refer to the Colvins and the Swifts collectively as "defendants."

In March 2006, plaintiff entered into a residential construction contract with Elliot Building Group, Ltd. (Elliot), a developer, for concrete work on two properties owned by Forest Walk Associates, L.L.C. (Forest Walk). Plaintiff completed the work on October 26, 2006. Forest Walk and Elliot defaulted on payment.

On December 20, 2006, the Swifts purchased one of the properties from Forest Walk, but did not record their deed until February 5, 2007. In the meantime, on December 22, 2006, plaintiff filed notices of unpaid balance (NUBs) in the Cumberland County clerk's office against Forest Walk, care of Elliott, for both properties pursuant to N.J.S.A. 2A:44A-20. On December 28, 2006, the Colvins purchased the other property.[2] Plaintiff sought $26,589.28 against the Colvins' property and $23,526.28 against the Swifts' property.

On January 23, 2007, plaintiff filed a construction lien claim against both properties in the aforesaid amounts pursuant to N.J.S.A. 2A:44A-8 and -21b(8), and served them on Forest Walk, care of Elliot. On February 20, 2007, plaintiff filed a complaint against Forest Walk and Elliot but did not join the Colvins or the Swifts, who owned the properties at the time.

[2] There is no evidence of a recording date for this deed.

That matter was settled by way of a stipulation in lieu of judgment entered on April 4, 2007, which required Forest Walk and Elliot to make certain payments, among other things. After Forest Walk and Elliot defaulted, plaintiff obtained a judgment against them in May 2007.

On June 10, 2007, Forest Walk and Elliot jointly filed a Chapter 11[3] petition for bankruptcy in the United States Bankruptcy Court for the District of New Jersey. On August 31, 2007, they filed an adversary complaint against plaintiff to determine the extent, validity, and priority of its construction liens against the properties. On October 5, 2007, plaintiff filed an answer, crossclaims and a third-party complaint against Forest Walk, Elliott, the Colvins and the Swifts. In the third-party complaint, plaintiff alleged that Forest Walk transferred title to the properties to the third-party defendants with knowledge of plaintiff's lien claims, and the Colvins and the Swifts acquired title from Forest Walk on December 28, 2006, and December 20, 2006, respectively.

The bankruptcy action was eventually settled. The settlement agreement contained a general release by plaintiff in favor of Forest Walk and Elliot, which discharged all claims against Forest Walk and Elliot,

---

[3] See 11 U.S.C.A. §§ 1101 to 1174; Fed. R. Bankr. P. 1002.

> including, but not limited to, . . . proofs of claim filed in the Debtors' . . . bankruptcy cases, the Crossclaims, demands, actions, causes of action, complaints, suits, debts, dues, sums of money, contracts, agreements, damages and judgments of any kind or nature whatsoever, whether in law or equity, they may have had, may now have, or may hereafter have, known or unknown, from the beginning of time to and including the date of the Settlement Agreement.

The bankruptcy court approved the settlement agreement on September 17, 2008. Based on the release, the Colvins' counsel demanded that plaintiff discharge the lien claim on their property. Instead, plaintiff filed a motion to amend the settlement agreement to preserve its claims against Forest Walk and Elliot. On April 15, 2009, the bankruptcy court denied plaintiff's motion and dismissed plaintiff's third-party complaint for lack of continued subject matter jurisdiction without prejudice to plaintiff's right to file an action in the Superior Court.

On April 28, 2009, plaintiff filed a complaint against the Colvins and the Swifts seeking to satisfy the liens. The Colvins and the Swifts filed summary judgment motions to dismiss the complaint and discharge the liens and for attorneys' fees and costs.

The motion judge granted summary judgment to defendants, concluding: (1) the bankruptcy court lacked supplemental

jurisdiction over the third-party complaint so, therefore, plaintiff does not get the benefit of the one-year time frame; (2) the complaint was, consequently, untimely under the CLL; (3) defendants never "had any notice of anything[;]" and (4) the release in the bankruptcy settlement "was broad enough and inclusive enough to require the discharge of th[e] lien[s]." The judge declined to award attorneys' fees and costs to the Colvins, concluding that the Colvins incurred no fees because their title company provided counsel to represent them. This appeal followed.

On appeal, plaintiff contends the judge misapplied the law relating to the statute of limitations for claims arising under the CLL, the settlement agreement in the bankruptcy action did not dispose of plaintiff's claims against defendants, and the New Jersey Recording Act, N.J.S.A. 46:15-1.1 to -26-1, does not bar plaintiff's claim against the Swifts.[4]

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 491 (2005); Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009). Thus, we consider, as the trial judge did, "'whether the evidence

[4] The Swifts allegedly filed a notice of settlement prior to the closing of title on their property and the filing of the NUBs.

presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

The CLL is strictly construed with respect to establishing a lien involving a residential construction contract. N.J.S.A. 2A:44A-5c; see also W. Va. Steel Corp. v. Sparta Steel Corp., 356 N.J. Super. 398, 405 (App. Div. 2003) (adhering to the "clear and unambiguous language of the statute" to defeat a party's attempt to enforce a construction lien). As a condition

precedent to the filing of a lien claim arising under a residential contract, the lien claimant must first file and serve a NUB on the owner of the property, and the contractor, against whom the claim is asserted. N.J.S.A. 2A:44A-6.[5] In addition, "simultaneously with the service [of a NUB], the lien claimant shall also serve a demand for arbitration . . . ." N.J.S.A. 2A:44A-21b(3).

It appears that plaintiff complied with N.J.S.A. 2A:44A-6 and -21b(3). Forest Walk was the "owner" of the properties at the time plaintiff filed and ostensibly served the NUBs and arbitration demand on Forest Walk care of Elliot. However, that does not end our inquiry.

According to the CLL, after filing and serving the NUB and demand for arbitration, the claimant must then file a lien claim "not later than 90 days following the date the last work, services, material or equipment was provided for which payment is claimed." N.J.S.A. 2A:44A-6. This court has previously emphasized the importance of strict compliance with the

---

[5] The CLL statutes cited in this opinion, N.J.S.A. 2A:44A-6, -8, -14a, -15a, -21b(3) and -30, were amended, and N.J.S.A. 2A:44A-16 was repealed, after the filing of the complaint in matter. See A. 410, 214th Leg., 2010 Sess. (Jan. 5, 2011) (enacted as L. 2010, c. 119) (an act revising the CLL). Our Supreme Court has decided against the retroactive application of legislation. See Nobrega v. Edison Glen Assocs., 167 N.J. 520, 537-38 (2001). Consequently, we do not consider the recent statutory changes in this appeal.

statutory requirements for filing lien claims. See Mansion Supply Co., Inc. v. Bapat, 305 N.J. Super. 313, 319 (App. Div. 1997), certif. denied, 153 N.J. 49 (1998) (refusing to extend "the ninety-day window within which a lien claim may be filed").

Also, the lien claim must name the owner (or lessee) of the property, N.J.S.A. 2A:44A-8, and it must be served on the owner and contractor, N.J.S.A. 2A:44A-7. Where property is conveyed between the time of the contract and the time of filing of the lien claim, the proper parties to the lien claim are the person or persons holding title when the lien claim is filed. Derrickson v. Edwards, 29 N.J.L. 468, 471 (E. & A. 1861). If the lien claim is not filed in accordance with the CLL's explicit procedures, it can be declared unenforceable. N.J.S.A. 2A:44A-15a; D.D.B. Interior Contracting, Inc. v. Trends Urban Renewal Ass'n, Ltd., 176 N.J. 164, 167-68 (2003).

In this case, defendants owned the properties at the time plaintiff filed the lien claims against Forest Walk, care of Elliot, on January 23, 2007. Plaintiff did not file a lien claim against defendants within the ninety-day period. See N.J.S.A. 2A:44A-6. Because the ninety-day period ought not be extended in light of the requisite strict compliance with the statutory requirements, plaintiff's argument that the thirty-day tolling provision of 28 U.S.C.A. § 1367 saves its claims in

State court is without merit. Plaintiff also did not name the Colvins or the Swifts on, or serve them with, the lien claims that plaintiff filed. See N.J.S.A. 2A:44A-7 to -8. Accordingly, plaintiff's failure to satisfy the mandatory requirements for enforcing its lien claims against defendants renders plaintiff's lien claims unenforceable, even if the period of limitations could be tolled by 28 U.S.C.A. § 1367.

Further, to enforce a properly filed lien claim, the claimant must file an action in the Superior Court to "establish" the lien "[w]ithin one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed[.]" N.J.S.A. 2A:44A-14a(1). The claimant must join as defendants in such action the contractor and "any other person having an interest in the real property that would be adversely affected by the judgment[,]" which plaintiff failed to do. N.J.S.A. 2A:44A-16a.

Also, plaintiff knew prior to the expiration of the one-year limitations period that defendants owned the properties. Indeed, twenty-one days prior to the expiration of that period, plaintiff had filed a third-party complaint against defendants in the bankruptcy action alleging they had acquired title to the properties from Forest Walk. Plaintiff was, thus, compelled to file a complaint against defendants before the expiration of the

one-year period. See N.J.S.A. 2A:44A-14a(1), -16. By failing to do so, plaintiff forfeited all rights to enforce the liens against defendants, N.J.S.A. 2A:44A-14a, and had to immediately discharge the lien of record in accordance with N.J.S.A. 2A:44A-30. Because plaintiff failed to discharge the lien of record in accordance with N.J.S.A. 2A:44A-30, plaintiff is liable for all court costs, and reasonable attorneys' fees, incurred by defendants in this action regardless of who represented them. N.J.S.A. 2A:44A-14b; see also N.J.S.A. 2A:44A-30. Having reached this conclusion, we do not address plaintiff's remaining contentions.

Affirmed in part, reversed in part, and remanded for a determination of the amount of court costs and reasonable attorneys' fees to award to the Colvins' counsel. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION