STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

PIONEER GENERAL CONTRACTORS, INC.,

Plaintiff,

vs.

20 FULTON STREET EAST LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP; 20 FULTON STREET EAST II LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP; 20 FULTON STREET EAST LLC; 20 FULTON STREET EAST COMMERCIAL LLC; KC INVESTMENT, LLC; 20 FULTON STREET EAST ASSOCIATION; WELLS FARGO BANK; BROOKSTONE REALTY DEVELOPMENT SERVICES, INC.; and LAKE MICHIGAN CREDIT UNION,

Defendants.
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Case No. 18-11072-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING PARTIAL SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) ON PLAINTIFF'S LIEN FORECLOSURE CLAIM AND DEFENDANTS' SIXTH AMENDED AFFIRMATIVE DEFENSE

A beautiful, new building stands near the intersection of Fulton Street and Division Avenue in the very center of Grand Rapids, but the battle over payment for that structure at 20 Fulton Street East shows no signs of abating. Plaintiff Pioneer General Contractors, Inc. ("Pioneer") served as the general contractor on that construction project. When the property owners refused to pay everything that Pioneer and the subcontractors demanded for their work, Pioneer filed four construction liens on the property. The defendants contested the construction liens, so Pioneer included in its claims

against the property owners a count requesting foreclosure of the construction liens. The defendants concede that Pioneer complied with the stringent timing requirements of the Construction Lien Act, MCL 570.1101, *et seq*, but the defendants nonetheless insist that Pioneer should be afforded no relief on its construction-lien claim because Pioneer acted in bad faith and made excessive demands in its construction liens. Because the Court finds no fault with Pioneer's use of the construction liens, the Court shall award summary disposition under MCR 2.116(C)(10) to Pioneer with respect to liability on Count Two of its complaint as well as on the defendants' sixth affirmative defense.

I. Factual Background

Because Plaintiff Pioneer has sought partial summary disposition under MCR 2.116(C)(10), the Court "must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." El-Khalil v Oakwood Healthcare, Inc, 504 Mich 152, 160 (2019). Thus, the defendants are entitled to the Court's consideration of the facts in the light most favorable to them. Accordingly, the Court shall provide the factual background of the construction-lien dispute in the manner in which the defendants would prefer to frame the issue.

The basic facts surrounding the construction-lien dispute are largely uncontested. Plaintiff Pioneer served as the general contractor on the construction project at 20 Fulton Street East. In that capacity, Pioneer had a contractual relationship with the property owners, performed services for the benefit of the property owners, and oversaw the work of numerous subcontractors. The building was divided into four units that had separate owners. Work on the project started in 2015, a "Certificate of Use & Occupancy" was issued on June 30, 2017, see Complaint, Exhibit 6, and then tenants began moving into the building shortly thereafter. But the owners and their architect refused to provide a

certificate of substantial completion, so Pioneer and the owners entered into negotiations and reached a settlement agreement on May 24, 2018. See Complaint, Exhibit 7. After Pioneer completed the work it promised to perform under the settlement agreement, Pioneer sent a letter to the owners that "serve[d] as a Notice of Completion of the Incomplete Work identified in the Settlement Agreement dated May 24, 2018 between the Owners and Pioneer Construction." See Complaint, Exhibit 8. The letter demanded payment from the owners in the amount of $1,000,000, see id., and promised that, "[u]pon confirmation that the $1,000,000.00 is available in escrow and ready for disbursement, we will authorize the discharge of all outstanding construction liens." Id. But the owners did not make the $1,000,000 payment to Pioneer, so Pioneer filed this suit on December 14, 2018.

Plaintiff Pioneer's complaint not only alleges in Count One that the defendants breached the May 24, 2018, settlement agreement by refusing to pay Pioneer $1,000,000, but also seeks in Count Two foreclosure of the construction liens on the property.[1] The complaint recites the steps taken by Pioneer to place construction liens on the property, and the defendants have chosen not to challenge the timing of Pioneer's actions under the Construction Lien Act. Accordingly, technical compliance with the Construction Lien Act is not an issue that the Court must address. But the defendants insist that Pioneer filed the construction liens in bad faith, so the construction liens are invalid as a matter of Michigan law. Pioneer chose to call the question by moving for summary disposition under MCR 2.116(C)(10) in an effort to obtain a favorable ruling on liability on Count Two of the complaint and

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[1] Our Court of Appeals has noted that "[t]he enforcement of the lien through foreclosure is a cumulative remedy that may be pursued simultaneously with an action on the contract from which the lien arose." Dane Construction, Inc v Royal's Wine & Deli, Inc, 192 Mich App 287, 293 (1991). Thus, Plaintiff Pioneer may pursue a claim for breach of contract and also seek "to foreclose under its construction lien" as "an in rem action that would permit recovery of damages through the sale of the improved property." Id. Although Pioneer "is permitted only one satisfaction for the debt owed to it," Pioneer may "utilize all available remedies in order to collect on that debt." Id. at 294.

to knock out the defendants's sixth affirmative defense, which states that Pioneer's "claims may be barred or limited because of their failure to comply with the Michigan Construction Lien Act." Both sides have offered sophisticated arguments about Pioneer's request for foreclosure of its construction liens, so the Court must take up the issues presented by the parties.

II. Legal Analysis

To obtain partial summary disposition under MCR 2.116(C)(10) on the matters involving the construction liens, Plaintiff Pioneer must establish that "there is no genuine issue of material fact." El-Khalil, 504 Mich at 160. "'A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.'" Id. The Construction Lien Act "'is intended to protect the interests of contractors, workers, and suppliers through construction liens,'" while also protecting owners of real property "'from excessive costs.'" See Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, 499 Mich 544, 552 (2016). The fundamental purpose of the Construction Lien Act "with respect to contractors, workers, and suppliers" like Pioneer "is to provide a method to secure payment for their labor and materials." Id. at 552-553. Significantly, the Construction Lien Act is "a 'remedial statute [that] shall be liberally construed to secure the beneficial results, intents, and purposes of th[e] act.'" Id. at 553. Thus, in addressing Pioneer's summary disposition motion, the Court "should always be mindful of the [Construction Lien Act]'s intended purpose." Id.

Although the defendants concede, as they must, that Plaintiff Pioneer followed the stringent requirements of the Construction Lien Act in placing their liens upon the defendants' property, they argue that Pioneer's liens are invalid for three reasons. First, they assert that Pioneer filed liens far in excess of what the defendants could possibly owe. Second, they contend that Pioneer orchestrated

a scheme with several subcontractors to file the liens in bad faith. Third, they insist that Pioneer was obligated, as a matter of contract, to keep the property lien-free. The Court shall address these three arguments in turn.

A. Excessive Amounts.

The defendants accuse Plaintiff Pioneer of filing construction liens that reflect amounts well in excess of anything due under the parties' contracts. The defendants base their argument upon the language of MCL 570.1107(6), which states:

> If the real property of an owner . . . is subject to multiple construction liens, the sum of the construction liens shall not exceed the amount the owner agreed to pay the person with whom he or she contracted for the improvement . . . less payments made by or on behalf of the owner[.]

According to the defendants, Pioneer and several of its subcontractors filed construction liens in the aggregate amount of $5,992,149.46, but the total amount owed to Pioneer and the subcontractors was $3,630,767, so the total amount of the construction liens exceeded the amounts the defendants owed by $2,361,382.46. The defendants insist that, because the construction liens included the duplication of charges for work performed by subcontractors, Pioneer inflated its construction liens by double-charging the defendants for the subcontractors' work, and thereby violated MCL 570.1107(6).

Plaintiff Pioneer does not quarrel with the defendants' numbers or their arithmetic. Instead, Pioneer asserts that, under MCL 570.1107(1), "[e]ach contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner . . . who contracted for the improvement to the real property[.]" The only restriction placed upon a construction lien is that it "shall not exceed the amount of the lien claimant's contract less payments made on the contract." See MCL 570.1107(1). Therefore, each claimant's construction lien cannot

exceed the amount due to that specific claimant, but the aggregate amount of all of the construction liens may exceed the aggregate amount owed to all of the lien claimants when the general contractor and the subcontractors have valid claims against the owner for the same unpaid obligations arising from work on the same construction project.

For two reasons, the Court concludes that Plaintiff Pioneer has furnished the better reading of the Construction Lien Act. First, the Court believes that Pioneer made no error in its calculation of the amounts of its liens, notwithstanding the fact that its liens combined with the subcontractors' liens add up to more than the total outstanding obligation of the defendants. Our Court of Appeals has adopted Pioneer's interpretation of MCL 570.1107(1) and (6) – albeit in an unpublished opinion – by stating that "[t]here is simply no precedent for holding a [construction] lien void ab initio where the sum total of the liens at the time they are independently filed by various contractors and suppliers is greater than the price stated in the general contract." Dubuc v Copeland Paving, Inc, No 325228, slip op at 4 (Mich App March 29, 2016) (unpublished decision). Second, even if Pioneer made an error in computing the amounts due from the defendants, as a general rule "the appropriate remedy is simply to reduce the amount of the lien."[2] Tempo, Inc v Rapid Electric Sales and Service, Inc, 132 Mich App 93, 104 (1984). That approach is consistent with the accepted view that the inclusion of any excess amount in a construction lien "would only be a defense to the extent that 'the sum of the construction liens . . . exceed[ed] the amount'" that the property owner agreed to pay the contractor "under their contract." Kincaid Henry Building Group, Inc v Heart of Howell, LLC, No 346034, slip op at 8 (Mich App Dec 3, 2020) (unpublished decision).

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[2] The exception to the general rule involves cases "where bad faith is evident." Tempo, Inc v Rapids Electric Sales and Service, Inc, 132 Mich App 93, 104 (1984). Here, the defendants have alleged bad faith, which the Court will discuss in the next subsection of this opinion.

Because the Court shall follow the lead of our Court of Appeals and adopt the approach that Plaintiff Pioneer has proposed for interpreting MCL 570.1107(1) and (6), the Court concludes that the defendants may use MCL 570.1107(6) merely as a defense to avoid making aggregate payments that exceed the outstanding amount due under the parties' contracts. Accordingly, Plaintiff Pioneer may proceed on its claim in Count Two for foreclosure of its construction liens despite the fact that its construction liens coupled with the subcontractors' construction liens exceeded the total amount that the defendants owed to the general contractor, *i.e.*, Pioneer, and the subcontractors. The mere fact that the total amount of the construction liens filed by Pioneer and the subcontractors exceeded the total amount due from the defendants does not render Pioneer's construction liens void *ab initio* under MCL 570.1107(6).

B. Bad Faith.

The defendants contend that Plaintiff Pioneer filed the construction liens in bad faith, thereby rendering the liens invalid. "Even where the amount of a lien filed is found to be excessive, the lien is lost only where bad faith is evident[.]" Tempo, Inc, 132 Mich App at 104. If "the lien included amounts for labor not actually performed and materials not in fact furnished[,]" that may rise to the level of bad faith. Id., citing Sacchetti v Recreation Co, 304 Mich 185, 192 (1943). Pioneer made no such indefensible misrepresentations. Instead, Pioneer merely used amounts in its construction liens that duplicated obligations that the defendants owed to the various subcontractors who worked on the project but did not receive payment in full from the defendants. As the Court has explained, that conduct in and of itself did not violate the Construction Lien Act. But the defendants insist that they have more to offer in support of their claim of bad faith on the part of Pioneer. Specifically, the

defendants point to a "liquidating agreement" between Pioneer and the subcontractors that reflected the terms on which each of them would file construction liens reflecting their uncompensated work on the project. See Defendants and Counter-Plaintiffs' Opposition to Plaintiff/Counter-Defendant's Motion for Partial Summary Disposition, Exhibit 17 (Liquidating Agreement). The defendants seem to suggest that a "liquidating agreement" among a general contractor and subcontractors is so sinister that it necessarily evinces bad faith, but legal research reveals that such agreements are sensible and commonplace. See Sloan & Co v Liberty Mutual Ins Co, 653 F3d 175, 182 (3rd Cir 2011) (noting that liquidating agreements are "common in construction contracts"). In simple terms, a liquidating agreement "provides a procedural mechanism for pass-through claims – a process by which a general contractor may assert the claims of its subcontractors against an owner." Id. Such agreements are negotiated "to give the subcontractor some means of redress against the owner in situations where it would otherwise have none because it lacks privity of contract with the owner." Id. at 183. Thus, the Court cannot find bad faith just because Pioneer entered into a "liquidating agreement" with the subcontractors who worked on the project.

The defendants fault the timing of the "liquidating agreement," which Plaintiff Pioneer and the subcontractors executed in January 2018 shortly before the filing of the construction liens at issue in Count Two of the complaint. The Court, however, finds nothing untoward about the execution of the "liquidating agreement" in anticipation of the filing of construction liens by Pioneer and the subcontractors. Indeed, the defendants apparently had no legal concerns about the construction liens in 2018 because they chose to enter into a settlement agreement with Pioneer on May 24, 2018, that acknowledged all of the construction-lien amounts and allowed Pioneer and two subcontractors to maintain their construction liens in the aggregate amount of $1,000,000. See Complaint, Exhibit 7

(Settlement Agreement, Exhibit B – Escrow Agreement, §§ 3-4). That settlement agreement made crystal-clear that Pioneer's aggregate claim on its four construction liens was for $3,630,767, see id. (Settlement Agreement, Exhibit B – Escrow Agreement, § 3), and broke out the amounts of the four construction liens filed against the four separate units owned by four separate defendants. See id. The acknowledgment of those four construction liens as well as the construction liens filed by seven subcontractors, see id., when coupled with the defendants' willingness in the settlement agreement to allow construction liens in the aggregate amount of $1,000,000 to remain on the property, see id. (Settlement Agreement, Exhibit B – Escrow Agreement, § 4(a)), undermines the defendants' position that Pioneer acted in bad faith in placing construction liens upon the property.

Plaintiff Pioneer's assertion of good faith is fortified by its actions after the execution of the settlement agreement on May 24, 2018. Although the settlement agreement permitted Pioneer to maintain its construction liens in the amount of $689,170.26,[3] see Complaint, Exhibit 7 (Settlement Agreement, Exhibit B – Escrow Agreement, § 4(a)), Pioneer voluntarily reduced its lien claim from that amount to $385,000 in response to a payment received from the defendants.[4] Beyond that, when the defendants wanted to remove Pioneer's remaining liens in December 2020, Pioneer agreed to the defendants' proposal to post $772,760.60 in a cash account in lieu of incurring the expenses required to post a bond. See Stipulation Regarding Security to Discharge Liens (December 4, 2020). That accommodation afforded to the defendants bespeaks the good faith demonstrated by Pioneer from

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[3] The $1,000,000 ceiling on construction liens comprised $689,170.26 for Plaintiff Pioneer, $223,560 for Vos Glass, and the revised amount of $87,269.74 for Allied Electric. See Complaint, Exhibit 7 (Settlement Agreement, Exhibit B – Escrow Agreement, §§ 3(a) & 4(a)).

[4] That payment also resulted in the discharge of the construction liens filed by subcontractors Vos Glass and Allied Electrical. See Plaintiff's Brief in Support of its Motion for Partial Summary Disposition, Exhibit 10.

start to finish in its use of construction liens. In sum, because Pioneer's conduct in dealing with the construction liens constitutes the antithesis of bad faith, the Court rejects the defendants' attempt to invalidate Pioneer's construction liens *ab initio* based upon the argument that "bad faith is evident."[5] See Tempo, Inc, 132 Mich App at 104.

C. Contractual Obligations.

The defendants' weakest theory for defeating Plaintiff Pioneer's construction liens depends upon the language of the parties' contracts. Specifically, the master contract for the project that the parties signed on March 22, 2016, contemplated the possibility of construction liens by stating that "[t]he Owners acknowledge and agree that construction lien claimants shall have a lien upon the real property, and not just the improvements." See Plaintiff's Brief in Support of its Motion for Partial Summary Disposition, Exhibit 1 (Master Contract, § 8 – Construction Lien Rights). The "Standard Form of Agreement Between Owner and Contractor" discussed construction liens by prescribing the mechanisms to deal with any construction liens filed against the property based upon allegations that "the Contractor or any Contractor Agent has failed to perform its contractual obligation or to make payment" for labor or materials. See id., Exhibit 2 (AIA Document A101 - 2007, § 3.18.4). But the construction liens at issue in this case did not flow from allegations of such misconduct by Pioneer. Similarly, the "Standard Form Agreement Between Owner and Contractor" directed Pioneer to clear all construction liens "[i]f any Contractor Agent makes, records, or files, or maintains any action on or respecting a claim of construction lien . . . relating to the Work ***and Owner has paid for the Work***

[5] Because the record unmistakably establishes that Plaintiff Pioneer did not act in bad faith, the Court need not take up Pioneer's arguments that the defendants are barred from challenging the construction liens by the doctrines of equitable estoppel and estoppel by laches.

at issue or payment for the Work at issue is not yet required to be paid under the Contract Documents." Id., Exhibit 2 (AIA Document A101 – 2007, § 3.18.5) (emphasis added). In this case, however, the construction liens resulted from the defendants' failure to pay for "the Work at issue[,]" see id., rather than from anything Pioneer did or failed to do. Accordingly, the contractual language cited by the defendants provides no assistance to them.

Beyond the failure to cite any contractual language that required Plaintiff Pioneer to address construction liens arising from the defendants' failure to pay for work performed on the project, the defendants' contractual argument runs headlong into a prohibition set forth in the Construction Lien Act. Specifically, pursuant to MCL 570.1115(1), "[a] person shall not require, as part of any contract for an improvement, that the right to a construction lien be waived in advance of work performed." Indeed, any "waiver obtained as part of a contract for an improvement is contrary to public policy, and shall be invalid, except to the extent that payment for labor and material furnished was actually made to the person giving the waiver." See MCL 570.1115(1). Here, the defendants insist that their contract with Pioneer obligated Pioneer to clear its own construction liens from the property, which would render nugatory Pioneer's right to a construction lien in the first place. A contractual waiver of the right to a construction lien and a contractual obligation to remove one's own construction lien are functional equivalents. The record leaves no doubt that Pioneer was diligent about obtaining lien waivers whenever money flowed from the defendants to pay for work performed on the project. See Plaintiff's Brief in Support of its Motion for Partial Summary Disposition, Exhibit 11. Therefore, it would be odd behavior for Pioneer to file construction liens on its own behalf if the defendants had provided the money necessary to cover their obligations to Pioneer. The record plainly establishes that Pioneer engaged in no such behavior, so it was entitled to file its construction liens.

III. Conclusion

For the reasons set forth in this opinion, the Court concludes that Plaintiff Pioneer is entitled to partial summary disposition under MCR 2.116(C)(10) with respect to liability on Count Two of its complaint as well as the defendants' sixth affirmative defense. The Court finds no genuine issue of material fact concerning the propriety of Pioneer's use of construction liens in this case. Without question, Pioneer had the legal right to file construction liens when the defendants failed to provide payments to cover their obligations to Pioneer arising from the construction project on which Pioneer served as the general contractor.

IT IS SO ORDERED.

Dated: March 30, 2022

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge