

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

RUTH ANN LIEBZIET, d/lo/a H L
ELECTRIC

Plaintiff,

File No. 91-9063-CK
HON. PHILIP E. RODGERS, JR.

vs

NORTHWOOD INDUSTRIES, INC., a
Michigan Corporation; THUMB
PLASTICS-McALLEN, INC., a foreign
Corporation; THUMB PLASTICS, INC.,
a Michigan Corporation; NBD BANK
OF DETROIT, N.A.; PEPRO ENTERPRISES,
INC, a Michigan Corporation;
MANUFACTURERS NATIONAL BANK OF
DETROIT; and GERALD D. GILMORE and
NEVA M. GILMORE, husband and wife,

Defendants;

Barry L. Levine (P2 9 7 04)
Attorney for Plaintiff

Thomas R. Alward (P3 1724 '
Attorney for Defendant
NBD Bank of Detroit

E. Duane Cubitt (P 12 3 7 3)
Attorney for Defendants
Thumb Plastics & Pepro Ent.

Gary M. Ford (P29979)
Attorney for Defendants
Gerald & Neva Gilmore

Michael R. Main (P16996)
Attorney for Defendant
Manufacturers Nat'l Bank

DECISION AND ORDER

Plaintiff seeks foreclosure on a construction lien in accordance with the Construction Lien Act, MCLA 570.1101 et seq; MSA 26.316 et seq (hereinafter referred to as the Act.) With the exception of Northwood Industries, Inc., the remaining Defendants have filed Motions for Summary Disposition. The Court's Decision is predicated on MCR 2.116(C)(8). The Court has reviewed the briefs and documents filed by the parties and entertained the oral arguments of counsel. Pursuant to the applicable standard of review and for the reasons stated on the record and set forth herein, the Defendants' Motions are granted. Plaintiff has additionally sought leave to amend pursuant to MCR 2.116(I)(5). In view of the current status of the pleadings and the nature of the proposed amendment, the Court is satisfied that there are defects which cannot be overcome and the amendment would not be justified. Plaintiff's Motion is denied and the case against all the Defendants other than Northwood Industries, Inc. will be dismissed with prejudice.

Plaintiff has asserted a construction lien originating out of work performed pursuant to a contract between Plaintiff and Northwood Industries, Inc. Plaintiff acknowledges that the Complaint fails to state the existence of any contractual relationship between Plaintiff and any Defendant other than Northwood Industries, Inc. Rather, Plaintiff asserts that the Defendant Gerald Gilmore was an owner and landlord of the premises improved at Northwood's request and a principal of the Defendant Northwood Industries, Inc.

Pursuant to the authority in *Norcross Co v Turner-Fisher Assoc*, 165 Mich App 170, 181 (1987), Plaintiff seeks leave to amend her complaint and assert a claim of implied agency. In this fashion, Plaintiff believes she can reach the owners' interest in the premises. To do so, Plaintiff must show that the lessee (Northwood) became the lessor's (Gilmore) agent with authority to contract for improvements which were of substantial benefit to the lessor. For reasons that will be discussed ahead, this amendment would be futile as other defects in the pleadings cannot be overcome.

The Defendants Thumb Plastics-McAllen, Inc., Thumb Plastics, Inc. Pepro Enterprises, Inc. and Manufacturers National Bank of Detroit are parties who either purchased equipment from Northwood pursuant to a bulk sales transfer or financed that purchase and have perfected security interests in the equipment. The Defendant NBD Bank of Detroit holds a mortgage on the real property.

As to those Defendants involved with the purchase or financing

of the equipment, Plaintiff was provided notice of a bulk transfer under Article VI of the Uniform Commercial Code on June 20, 1990. No action under Article VI was brought within six months after the date of transfer nor was the instant complaint filed until June 19, 1991. Accordingly, any interest which Plaintiff may have had in the equipment transferred to Thumb Plastics, et al, has been eliminated by an effective bulk transfer. MCLA 440.6111.

Additionally, there can be no lien on this equipment unless it is identified as fixtures and the claim of lien was perfected against the owners of the real property. Without addressing the factual issue as to whether or not the machines transferred were fixtures, it is now impossible for Plaintiff to perfect a lien against the owners of the building.

Assuming that Plaintiff can cross the hurdle raised by the absence of a direct contractual relationship with the owner by asserting a theory of implied agency, Plaintiff's failure to serve both owners of the building in a timely fashion with her claim of lien renders the complaint procedurally defective. The Defendants Gilmore correctly note that the claim of lien fails to recognize either Defendant Gerald or Neva Gilmore as an owner of the property and no claim of lien was perfected against the real property held by the Gilmores as individuals.

Perfection of a claim of lien requires service upon the owner personally or by certified mail within fifteen days after timely recording a claim of lien. MCLA 570.1111(5). A careful review of the documents attached to the Plaintiff's complaint indicates that no effort was ever made to claim a lien against any entity other than the lessee, Northwood Industries, Inc. Its designee was Gerald Gilmore and he received notice of the claim of lien in that capacity. There is no evidence that Gerald D. Gilmore and Neva M. Gilmore were served with the claim of lien as owners of the property upon which Plaintiff's were attempting to create a lien. Thus, even if the Court accepted Plaintiff's implied agency theory at face value and, in accordance with Norcross, *supra* assumed Northwood was acting as the owners' agent with the authority to contract for improvements which would be of substantial benefit to the Gilmores, Plaintiff's cannot show that they properly and timely perfected their claim of lien against Gerald and Neva Gilmore as co-owners of the leasehold. Rather, the claim of lien was directed to Northwood Industries, Inc. as lessee and served upon Mr. Gilmore only as its registered agent. No notice of commencement was prepared and none has been provided to the Court which would designate either Mr. Gilmore or Northwood

Industries, Inc. as the owners' designee for purposes of receiving notice of any claim of lien. As the Court of Appeals noted in *Blackwell v Bornstein*, 100 Mich App 550, 555; 299 NW2d 397 (1980), substantial compliance with the Mechanics Lien Statute is not sufficient to create a valid lien.

The standard of review for a (C)(8) motion is set forth in *Mitchell v General Motors Acceptance Corp.* 176 Mich App 23 (1989) "A motion for summary disposition brought under MCR 2.116 (C) (8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Beaudin v Michioan Bell Telephone Co.* 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [*Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).]"

Based upon the foregoing discussion, the Court is not only persuaded that Plaintiff's complaint is defective and the Defendants' Motions for Summary Disposition well founded, but that the amendment proposed by the Plaintiff to assert a claim of implied agency could not cure the underlying defect in the failure to properly perfect the claim of lien. The Defendants who purchased or financed equipment pursuant to a valid bulk sale have extinguished any arguable lien due to Plaintiff's failure to levy on those assets within six months after the transfer. However, there can be no valid claim against the Defendants Gilmore or NBD either. To do so, the owners of the leasehold or any designee of theirs properly identified in the notice of commencement would have to have been timely served with the claim of lien. This did not happen and Plaintiff can take no action to retroactively cure this defect. Therefore, all Defendants' Motions are granted. Plaintiff's Motion to Amend is denied and the case against all Defendants, except Northwood Industries, Inc., is dismissed with prejudice.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.

Circuit Court Judge

Dated: 11/27/91