UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0921

September Term, 2015

COMMERCIAL CONTRACTORS GROUP, INC.

v.

FC GEN REAL ESTATE, LLC, *et al.*

Nazarian,
Reed,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: August 11, 2016

From 2013 through the summer of 2014, appellant/cross-appellee Commercial Contractors Group, Inc. ("CCG") performed plumbing and piping work on a healthcare facility in Anne Arundel County as a subcontractor to H&B Plumbing and Heating, Inc., who in turn was a subcontractor to the general contractor, Burris Construction Company, Inc. ("Burris"). Following a payment dispute between Burris and the owner of the facility, Genesis Operations, LLC, CCG was not paid for its work.

After sending notice of its intention to seek a mechanics' lien on the property to appellees/cross-appellants Burris, Genesis Operations II LLC, Genesis Operations III LLC, Genesis Healthcare Corporation, and the record owner of the property, FC Gen Real Estate, LLC, on October 1, 2014, CCG filed a petition to establish a lien in the amount of $41,774 in the Circuit Court for Anne Arundel County. On October 10, 2014, CCG sent a revised notice alleging that the true amount owed was $85,391, and at the same time, filed an amended petition indicating the new amount. After a hearing, the circuit court established a mechanics' lien on the property in the original amount of $41,774, but denied CCG's request for the larger amount, due to a failure to comply with the notice provisions of the mechanics' lien statute, Maryland Code (1974, 2010 Repl. Vol., 2013 Supp.), Real Property Article ("RP") § 9-101, *et seq.*

CCG appealed, and now presents the following question for our review:

> Does Md. Code Ann. Real Prop. § 9-105(a)(1)(v) preclude the preparation and tender of the Notice of Intention to Claim a Lien required under Md. Code Ann. Real Prop. § 9-104 on the same day a Petition to Establish Lien is filed if such notice is served within one hundred twenty (120) days of the date upon which a claimant last performed work on the property which is subject to a lien?

FC Gen cross-appealed and presents the following questions for our review:

1. Did the Trial Court commit reversible error in establishing and enforcing a Mechanics' Lien where Notice was never given to leasehold tenant?
2. Did the Trial Court err in refusing to establish and enforce a Mechanics' Lien in the amount of $85,391.00 where the Petition did not include invoices or other material papers that constituted the basis of the lien?
3. Did the Trial Court err in refusing to increase the amount of the Mechanics' Lien pursuant to the Amended Petition where the Court found that it was filed prior to Notice being given?

For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

During the construction of a commercial rehabilitative care facility in Gambrills, titled Genesis Healthcare – Waugh Chapel, CCG was hired as a subcontractor to perform plumbing and piping work. A payment dispute arose between Genesis Operations, LLC and the general contractor, Burris, and, as a result, CCG did not get paid for certain work it performed. Hoping that it would still receive compensation for its work, CCG continued construction. On June 13, 2014, CCG passed a final plumbing inspection by Anne Arundel County Code enforcement officials for its work on the facility. Plumbing work on the facility continued, and the parties stipulated that July 24, 2014 was the final day of work by CCG. There is no dispute that CCG completed its part of the project on time and in a workmanlike manner.

On September 30, 2014, CCG gave its original notice of intent to claim a lien to Burris, Genesis Operations II LLC, Genesis Operations III LLC, Genesis Healthcare

Corporation, and FC Gen Real Estate.[1] The notice stated the amount due as $41,774.00 and erroneously stated the final day of work as June 13, 2014. On October 1, 2014, CCG filed a petition to establish and enforce mechanics' lien and claim for indemnification on bond. This filing similarly contained an incorrect final day of work as well as an incorrect amount due.

After realizing that the amount owed to it under the contract was actually $85,391, reflecting change orders that were not accounted for in the original notice of intent to claim a lien and original petition, on October 10, 2014, CCG sent a revised notice to appellees/cross-appellants, notified them of the revised total amount due, but still reflecting the final date of work as June 13, 2014.[2] On the same day, CCG filed an amended petition, which claimed the revised amount of $85,391 due. However, the amended petition referenced the notice that was sent on September 30, which stating the lower sum due of $41,774. Genesis Operations II LLC, Genesis Operations III LLC, and Genesis Healthcare Corporation received the revised notice on October 14, 2014, and Burris received the revised notice on October 15, 2014. The circuit court allowed Burris to intervene in the proceeding on behalf of Genesis and FC Gen Real Estate.

[1] Genesis Operations, LLC, Genesis Operations II LLC, Genesis Operations III LLC, Genesis Healthcare Corporation are related entities. The subcontract between Burris and H&B listed "Genesis Healthcare" as the owner for whom work was being done.

[2] RP § 9-104(a)(1) provides that notice must be sent to the "owner" within 120 days after a subcontractor does the work or furnishes the materials. The revised notice was sent 78 days following the final day of work on the facility.

At a hearing on the petition, held June 10, 2015, the court considered, among other things, Burris's argument that CCG was not entitled to a lien in any amount because CCG sent notice to Genesis Operations II LLC, Genesis Operations III LLC, Genesis Healthcare Corporation, and FC Gen Real Estate, but did not send notice to the correct entity—Genesis Operations, LLC, the tenant on the property—as required by RP §§ 9-101(f), -104(a).[3] Burris also argued that CCG did not comply with the requirements of the mechanics' lien statute because CCG filed its amended petition—which alleged an increased amount due—at the same time that it sent a revised notice of its intention to pursue a lien. CCG, on the other hand, argued that notice was sent to the proper entities because Genesis had not produced documents evidencing the existence or terms of a lease. CCG also argued that its revised notice was timely because it was sent on the same day that it filed its amended petition and because the owners received actual notice prior to 120-days from the work stoppage date of July 24, 2014.

A representative of Genesis Operations, LLC testified to the existence of a lease between FC Gen Real Estate and Genesis Operations, LLC, however, neither Burris nor Genesis's representative produced the lease. Because of Genesis's unwillingness to produce the lease, the circuit court precluded testimony about the contents of the lease under the Best Evidence Rule.

[3] RP § 9-101(f) defines owner as "the owner of the land except that, when the contractor executes the contract with a tenant for life or for years, 'owner' means the tenant."

Ruling from the bench, the court held that "the notice and the ultimate service on . . . FC Gen Real Estate, LLC is a sufficient compliance with the statute with respect to identifying and notifying the owner" because the court had "no way of knowing from the evidence . . . before [it] whether it is a tenancy for years, or a tenancy for minutes, or . . . is a real tenancy, or paper tenancy." In short, the court determined that CCG's notice of intent to claim lien sent to the record owner, FC Gen Real Estate, was proper because Genesis had not established itself as a leasehold "owner" under RP § 9-101(f).

The court found that CCG had performed work for which it had not been paid, and had demonstrated a basis for the imposition of a mechanics' lien in the amount claimed in the original petition, $41,774, plus prejudgment interest, at the constitutional rate of 6 percent. However, regarding the service of the revised notice and the filing of the amended petition, the court held that the notice needed to have been "given precedent to the filing of a petition," and found that "the Amended Petition was filed prior to the notice being given." The court, thus, found no basis to impose a mechanics' lien for $85,391, because the CCG's amended petition had not complied with the notice and timing requirements of RP §§ 9-104, -105(a)(1).

The court entered an order indicating its findings and rulings on June 12, 2015. CCG filed its notice of appeal on July 9, 2015, and Burris filed its cross-appeal on the same date. We address the issue raised in the cross-appeal first—notice to the proper owner—because a decision in favor of appellees/cross-appellants on that issue would render CCG's appeal moot.

DISCUSSION

I. Cross-Appeal: Notice Given to Proper Owner

The mechanics' lien statute is construed "in the most liberal and comprehensive manner in favor of mechanics and materialmen." *T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 296 (1956). The statute is remedial and is to be construed to give effect to its purpose. RP § 9-112. "The need for a liberal construction is particularly important with respect to subcontractors who, though benefitting the owner and enhancing the value of the owner's property by the provision of their labor or materials, have no direct contractual relationship with the owner and therefore cannot otherwise subject the owner's property or assets to the payment of their claims." *Winkler Const. Co. v. Jerome*, 355 Md. 231, 246 (1999).

Under the mechanics' lien law, a subcontractor must give notice to the owner of the property of its intention to obtain a lien. *See* RP § 9-104. Additionally, in order to establish the lien, the subcontractor must set forth in its petition "facts showing that the notice required under § 9-104 of this subtitle was properly mailed or served upon the *owner*, or, if so authorized, posted on the building." RP § 9-105(a)(1)(v) (Emphasis added). The statute defines an "owner" as "the owner of the land except that, when the contractor executes the contract with a tenant for life or for years, 'owner' means the tenant." RP § 9-101(f).

Burris, who intervened on behalf of FC Gen Real Estate and Genesis, argues that the circuit court erred in imposing any lien because CCG failed to comply with the

statute. Specifically, Burris argues that CCG "never sent notice of intention to claim lien to the leasehold owner pursuant to [RP] § 9-104, and its petition is deficient for failure to include facts shown that notice was properly mailed or served upon the owner pursuant to § 9-105(a)(l)(v)." CCG responds that neither Burris nor Genesis produced a document showing the terms of a leasehold tenancy, and, therefore, the court did not err in finding that service was sent to the proper parties under the statute.

CCG sent its original September 30, 2014 notice via certified mail to Burris Construction Company, Inc. (served on CSC Lawyers Incorporating Service Co. and on Michael P, Darrow, Esquire), to FC Gen Real Estate, LLC (served on CSC Lawyers Incorporating Service Co. and on Gerald W. Heller, Esquire), and to Genesis Operations II, LLC, Genesis Operations III, LLC, and Genesis Healthcare Corporation (served on Gerald W. Heller, Esquire, an attorney representing Genesis).

Burris alleges that an entity known as Genesis Operations, LLC (sans roman numerals) entered into a multi-year lease agreement with FC Gen Real Estate, and argues that, Genesis Operations's status as a tenant "for years" rendered it the proper owner under the definition provided by § 9-101(f).

At the hearing, Lisa Holahan, the director of litigation support for the Genesis entities, appeared as the representative of Genesis Operations, LLC. She testified to the existence of a lease between Genesis Operations, LLC and FC Gen Real Estate. However, the circuit court ruled that the Best Evidence Rule applied and, for this reason, prohibited her from describing the terms of the lease.

We will not set aside the judgment of the trial court on the evidence unless clearly erroneous. Md. Rule 8-131(c). Maryland Rule 5-103(a) provides that "error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling." "'The admission or exclusion of evidence is a function of the trial court which, on appeal, is traditionally viewed with great latitude.'" *Commercial Union Insurance Co. v. Porter Hayden Co.*, 116 Md. App. 605, 641 (1997) (quoting *Swann v. Prudential Ins. Co.*, 95 Md. App. 365, 374 (1993)).

The Best Evidence Rule, also known as the Original Document Rule, states that "*in proving the terms of a writing, where the terms are material, the original writing must be produced* unless it is shown to be unavailable for some reason other than the serious fault of the proponent." *State v. Brown*, 129 Md. App. 517, 522 (1999) (quoting *McCormick on Evidence* § 230 at 560 (2d ed. 1972)). "[P]resenting to a court the exact words of a writing is of more than average importance, particularly in the case of operative or dispositive instruments such as deeds, wills, or contracts, where a slight variation of words may mean a great difference in rights." *McCormick*, § 231 at 561. The Best Evidence Rule applies to the *contents* of a writing, not its existence. *Brown*, 129 Md. App. at 522-23 (citing 6 Lynn McClain, *Maryland Evidence State and Federal* § 1001.4, at 527 (1987)).

Neither Burris nor Genesis produced a lease showing the specifics of Genesis's tenancy to the circuit court. At the hearing, Burris and Genesis admitted that they had not produced the lease in discovery, and they did not attempt to introduce the lease into

evidence at the hearing. Under the Best Evidence Rule, Holahan could testify to the *existence* of the lease, but not its contents without producing the actual document. *See Brown*, 129 Md. App. at 522-23. Thus, the circuit court correctly applied the rule to preclude testimony about whether the lease between Genesis Operations and FC Gen Real Estate was "for years," as required by the mechanics' lien statute in order for a lessee to be considered an "owner."[4] *See* RP § 9-101(f).

The court found that "the notice and the ultimate service on . . . FC Gen Real Estate, LLC is a sufficient compliance with the statute with respect to identifying and notifying the owner." In rendering its opinion from the bench, the court stated:

> Notwithstanding the fact that there may have been some tenancy here, I will say—since we're being hyper-technical—that I have no way of knowing from the evidence that before me whether it is a tenancy for years, or a tenancy for minutes, or, you know, is a real tenancy, or paper tenancy.
>
> I know that they've been there since 2011, I was told. But that doesn't necessarily mean anything in terms of whether they come [within] the exclusion of the statute. And I think because it is an exclusion to the presumption of the owner of the land is the owner of the land, that that is a burden that I think to some degree cannot be met.
>
> I mean, there could be a thousand undisclosed tenancies, and I don't think that's a burden that can be met by a Plaintiff under these circumstances. So, I do find that under the initial Petition, the original Petition, that the Petitioner in this case is entitled to a mechanics lien.

[4] We observe that although CCG did not name Genesis Operations, LLC in its initial notice, CCG did serve the notice on the attorney for Genesis Operations, LLC, and named Genesis Operations II and Genesis Operations III, which share a legal department with Genesis Operations, LLC.

We cannot say that the court's determination—that there was insufficient evidence of a tenancy for years—was clearly erroneous. The court did not err in determining that notice was sufficient under the statute to allow CCG to obtain a mechanics' lien.

II. Appeal: Timely Notice of Revised Amount Due

CCG argues that the court erred in concluding that it failed to comply with the mechanics' lien statute when attempting to amend its petition and limiting its lien amount to $41,774—the amount claimed in CCG's initial notice. Burris contends that CCG is not entitled to a lien in the amount of $85,391.00 because the revised notice was not tendered before CCG filed its amended petition.[5]

As mentioned above, the mechanics' lien statute has a remedial purpose and is to be construed liberally in light of that purpose. The liberal construction of the statute is "subject to the caveat, however, that, as a mechanics' lien was unknown at common law and is purely a creature of statute, it is 'obtainable only if the requirements of the statute are complied with.'" *Winkler Const. Co.*, 355 Md. at 246-47 (1999) (quoting *Freeform Pools v. Strawbridge*, 228 Md. 297, 301 (1962)). RP § 9-104(a)(1) provides that a subcontractor "is not entitled to a lien under this subtitle unless, within 120 days after

[5] Burris also maintains that notice was untimely because it was sent more than 120 days after CCG stopped working on the project. Because we determine that CCG failed to comply with the notice requirements of the statute with regard to its amended petition for a different reason, we need not decide this issue. However, we do note that Burris stipulated in the circuit court that the CCG's last day working on the project was July 24, 2014, which contradicts Burris's assertion on appeal that CCG's last day on site was June 13, 2014.

doing the work or furnishing the materials, the subcontractor gives written notice of an intention to claim a lien[.]" Subsection (c) provides: "The notice is effective if given by registered or certified mail, return receipt requested, or personally delivered to the owner by the claimant or his agent." To obtain a lien, a subcontractor must file a petition in the circuit court setting forth "facts showing that the notice required under § 9-104 of this subtitle was properly mailed or served upon the owner[.]" RP § 9-105(a)(1)(v).

We also consider the General Assembly's instruction in RP § 9-112, which provides: "Any amendment shall be made in the proceedings, commencing with the claim or lien to be filed and extending to all subsequent proceedings, as may be necessary and proper. *However, the amount of the claim or lien filed may not be enlarged by amendment*." (Emphasis added). The implication of RP § 9-112 is that a subcontractor cannot simply amend the amount claimed in its original petition. It must send new notice to the owner, and file an amended petition with the new amount after notice has been given.

As demonstrated by the text of the statute, the act of giving notice to the owner is integral to the statutory scheme. The history of the mechanics' lien statute provides a backdrop for the significance of the notice requirements in these circumstances. In *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, the Court of Appeals struck down the Maryland's mechanics' lien law because "law permit[ed] an owner to be deprived of a significant property interest without notice or a prior hearing." 277 Md. 15, 31 (1976).

Later, in *Winkler Construction Co. v. Jerome*, the Court reiterated the importance of the notice provisions and due process in the version of the statute implemented after 1976[6]:

> As a result of our decision in *Barry Properties*, finding Constitutional fault with the then-existing statutory approach, *the law was promptly and comprehensively rewritten to provide a greater measure of due process to the owner*. As we have indicated above, under the current law a lien is not created until it is established by a court, and it may not be established by a court, even on an interlocutory basis, absent a finding of probable cause made after the owner has an opportunity to object.

355 Md. 231, 247-48 (1999) (Emphasis added).

In this case, CCG sent notice to the owners on September 30, 2014, which claimed that $41,774 remained due and owing. The next day, on October 1, 2014, CCG filed an

[6] The history of the mechanics' lien statute was described by the Court of Appeals in *Winkler*:

> Prior to 1976, a mechanic's lien attached automatically as soon as the work was done or the materials were provided. That lien, created by operation of law, lasted for six months and could be extended simply by the contractor or subcontractor filing a claim with the clerk of the circuit court. *See Barry Properties v. Fick Bros.,* 277 Md. 15, 19, 353 A.2d 222, 226 (1976). Upon that *ex parte* filing, the lien continued for an additional year, subject to the claimant's suing to enforce it or the owner or other interested person suing to compel the claimant to prove the validity of the claim. Theoretically, the lien could exist for as long as 18 months before the claimant was required to prove the underlying basis for it. The only condition, in the case of a subcontractor who did not deal directly with the owner, was that the subcontractor give written notice to the owner within 90 days after furnishing the work or material. The function of that notice was to allow the owner to protect itself by withholding the amount of the claim from what otherwise would be due to the prime contractor, subject to later resolution or adjudication. *Barry Properties, supra,* at 20, 353 A.2d at 226. . . .

355 Md. at 247-48.

initial petition in the circuit court, which satisfied the requirements of RP § 9-105, and which restated the amount due as $41,774. After realizing that it had failed to include amounts due on change orders made on its contract, CCG sent a revised notice on October 10, 2014, claiming it was owed $85,391. That same day, CCG filed an amended petition to establish lien, restating the $85,391 amount. The amended petition, however, indicated that CCG had given notice on September 30—a notice that maintained the lower sum due of $41,774.

As noted above, the liberal construction of the mechanics' lien statute is "subject to the caveat that a lien is "'obtainable only if the requirements of the statute are complied with.'" *Winkler Const. Co.*, 355 Md. at 246-47 (1999) (quoting *Freeform Pools*, 228 Md. at 301). CCG argues that Genesis received notice within the 120 days from the final date of work when it, in fact, received the revised notice via certified mail on October 14, and, accordingly, it does not matter that its amended petition was filed on October 10, 2014. Under CCG's reading of the statute, a subcontractor could file a petition for a lien well before sending notice to the owner, and the petition would be valid as long as the subcontractor sends notice sometime within the 120-day period. This reading, however, ignores the purpose of the statute—owners must have notice of the amount claimed to be due *before* the petition to establish lien is filed.[7] *See* RP § 9-104(b), -105(a)(1)(v).

[7] CCG also argues that Genesis received notice when the first-tier plumbing subcontractor, H&B, filed its notice of intent to claim a lien on March 4, 2014. We (Continued . . .)

In light of the paramount importance of the notice provisions in the mechanics' lien statute, notice with the correct amount in dispute must be sent to the owners *prior* to the filing of a petition to establish the lien. Here, CCG did not comply with the notice requirements of the statute because the revised notice was sent at the same time that the amended petition was filed and because the amended petition referred to the prior notice with the incorrect amount due. *See* RP §§ 9-104, -105.

The circuit court similarly found that CCG had failed to comply with the notice requirements of the statute, finding that "[CCG]'s Revised Notice of Intention to Claim a Lien dated October 10, 2014, claiming an amount due and owing of Eighty Five Thousand Three Hundred Ninety One Dollars ($85,391.00) . . . was **not proper**, timely and in compliance with [RP] § 9-104 inasmuch as the same was not tendered PRIOR to the filing of the First Amended Petition to Establish Lien." (Emphasis in original). We, therefore, affirm the judgment of the circuit court in imposing a lien in the amount of $41,774, and not in the greater amount requested by CCG in its amended petition.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID ½ BY APPELLANT/CROSS-APPELLEE AND ½ BY APPELLEE/CROSS-APPELLANT.

(. . . continued)
disagree with CCG that H&B's notice was sufficient because that notice advised that H&B was owed $202,335.57, and did not mention any amount owed to CCG.