STATE OF MICHIGAN

COURT OF APPEALS

E.T. MACKENZIE COMPANY and KEYSTONE DESIGN GROUP,

Plaintiffs-Appellants,

v

LONG INVESTMENT COMPANY, LTD., LONG INVESTMENT COMPANY, LLC, LONG INVESTMENT, INC., NBD BANK CORPORATION, EQUITY FUNDING, INC., SOIL & MATERIALS ENGINEERS, INC., GE APPLIANCES DIVISION, GENERAL ELECTRIC COMPANY, MID-AMERICA TILE, INC., LANSING CLARION, LTD. PARTNERSHIP, MICHAEL D. DUDLEY, ROBERT C. LECY, GREGORY E. MAYVILLE, JAMES A. JARVIS, ANN O. JARVIS, MARGARET E. JACOBS, MICHAEL PANEK, GORDON L. LONG, LILLIAN G. LONG, and ANTHONY A. PARADISE TRUST & EXECUTIVE COMMONS, LLC.

Defendants,

and

COUNTRYWIDE HOME LOANS, INC., and RUSSELL HINKLE,

Defendants-Appellees.

UNPUBLISHED
June 26, 2007

No. 265811
Ingham Circuit Court
LC No. 03-000272-CK

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs E.T. MacKenzie Company (MacKenzie) and Keystone Design Group (Keystone) appeal the trial court's judgment in this construction lien case involving issues of

priority between plaintiffs' liens, authorized and recorded under the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, and mortgages held by defendant Countrywide Home Loans, Inc. (Countrywide). We reverse and remand for further proceedings.

In the late 1990s, defendant developer Gordon L. Long (Long) conceived a plan for a major construction project in Lansing that would involve renovating an existing Holiday Inn Hotel and Convention Center that Long had developed and built many years earlier. Long, through various corporate entities that he controlled, also planned to construct a Staybridge Suites Hotel, an office complex directly west of the Staybridge Suites Hotel, and multiple parking facilities. A lack of construction financing ended the project, but not before planning and design services were performed by Keystone and site preparation and infrastructure work was performed by MacKenzie, which parties were not paid for their services. This led to the execution and recording of construction liens by plaintiffs. The dispute involves 27 parcels of property that were lettered or designated for purposes of trial as parcels A through AB. The construction project encompassed these parcels. Countrywide recorded mortgages on these properties, and the case concerns the priority between these mortgages and plaintiffs' construction liens. The trial court ruled that Countrywide's mortgages had priority over all the parcels, except as to parcels X through AB, which area was designated as the Staybridge area, and parcels J and U, which parcels had their mortgages paid off in full by defendant Russell Hinkle. The court found that MacKenzie had priority in regard to the Staybridge area parcels because first actual physical improvements were made to those parcels by MacKenzie in June and July 2001 before the mortgages were recorded in September 2001. The trial court, however, also ruled that MacKenzie's liens attached only to the improvements and not the entire real property interest because the legal titleholders did not contract for the improvements.

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, when reviewing a trial court's ruling on matters of equity, which would include foreclosure proceedings, this Court reviews the trial court's conclusions de novo, but the trial court's underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Finally, interpretation of the CLA constitutes a legal issue that we review de novo on appeal. *DLF Trucking, Inc v Bach*, 268 Mich App 306, 309; 707 NW2d 606 (2005).

This appeal requires interpretation of the CLA,[1] and MCL 570.1302(1) specifically provides the manner in which to construe the act, providing:

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[1] Various sections of the CLA were amended by 2006 PA 497 and made effective January 3, (continued…)

> This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

While substantial compliance may be sufficient, "the act's clear and unambiguous requirements should not be ignored." *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997). The CLA was enacted "for the dual purposes of (1) protecting the rights of lien claimants to payment for expenses and (2) protecting property owners from paying twice for these expenses." *DLF Trucking*, *supra* at 311.

Plaintiffs present a preliminary issue with regard to whether we have jurisdiction over their claim of appeal. Plaintiffs argue that the trial court improperly closed the case because the judgment failed to adjudicate Keystone's rights and liabilities, because the judgment failed to address breach of contract claims relative to several defendants against whom defaults, but not default judgments, were entered, and because the court failed to comply with MCL 570.1121, which governs the entry of foreclosure judgments in construction lien cases.

This Court has jurisdiction to entertain an appeal by right from a final order of the circuit court as defined in MCR 7.202(6). MCR 7.203(A)(1). A final judgment or order in a civil action is "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." MCR 7.202(6)(a)(i); see also *Baitinger v Brisson*, 230 Mich App 112, 116; 583 NW2d 481 (1998). If the order from which the appeal is taken is not a final order within the meaning of the court rule, then this Court lacks jurisdiction under MCR 7.203(A). *Children's Hosp of Michigan v Auto Club Ins Ass'n*, 450 Mich 670, 677; 545 NW2d 592 (1996); *Faircloth v Family Independence Agency*, 232 Mich App 391, 401; 591 NW2d 314 (1998).

While some of the jurisdictional arguments presented by plaintiffs are meritorious, we decline to dismiss this case for lack of jurisdiction. Rather, assuming that plaintiffs are not entitled to an "appeal of right," and given that defendants do not challenge jurisdiction, along with considering the length of time this appeal has been pending, we shall treat plaintiffs' claim of appeal as an application for leave to appeal, grant leave, and address the substantive issues presented to us. MCR 7.203(B); *Newton v Michigan State Police*, 263 Mich App 251, 259; 688 NW2d 94 (2004), overruled in part on other grounds in *Watts v Nevils*, 477 Mich 856; 720 NW2d 755 (2006); *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

Plaintiffs next contend that the trial court erred in determining priority as between the mortgages and construction liens by examining the issue on a parcel by parcel basis rather than treating all 27 disputed parcels as a single unit, given that all of the parcels were part of a single

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(…continued)

2007. The amendments do not apply to this case, which arises out of facts that transpired in 2001, and which went to trial in the winter of 2005. Accordingly, recitation to the CLA is to the pre-amendment versions of the statutes.

development project, with the lot lines essentially being irrelevant. Because we determine that the trial court erred in finding that the first actual physical improvements on all of the parcels did not occur until after the mortgages were recorded, excluding those not disputed on appeal in regard to priority,[2] it is unnecessary for us to address this issue, and we decline to do so.

Plaintiffs next argue that the evidence established that there was clearing and grubbing and major infrastructure work done in June and July 2001 by MacKenzie outside of the Staybridge area and that this work constituted actual physical improvements, giving their liens priority over Countrywide's mortgages.

With respect to priorities, MCL 570.1119 provides in relevant part:

> (3) A construction lien arising under this act shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.
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> (4) 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 trial court concluded that MacKenzie had "grubbed" on all of the parcels outside the Staybridge area in June 2001, but that the grubbing did not amount to actual physical improvements. The trial court also concluded that any work beyond mere grubbing did not occur outside of the Staybridge area until after the mortgages were recorded in September 2001.

With respect to claims by plaintiffs that work beyond grubbing occurred outside of the Staybridge area before the mortgages were recorded, we cannot conclude that the trial court's finding to the contrary was clearly erroneous. Clearly, the trial court was swayed by the documentary evidence and contradictory photographs and did not accept all of the testimony given by Russell Hinkle and Timothy Larson. The issue of credibility was for the trial court and not us. See MCR 2.613(C).

The question that remains is whether the "grubbing" constituted actual physical improvements. The definition of "actual physical improvement" is as follows:

> "Actual physical improvement" means the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by

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[2] Although neglected by the trial court, we find that Keystone's liens with respect to parcels X through AB in the Staybridge area also have priority over Countrywide's mortgages. MacKenzie and Keystone have equal priority as to all the liens. See MCL 570.1119(1).

> 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. [MCL 570.1103(1).]

We conclude that the "grubbing" clearly qualified as a "change in" or "alteration of" the real property. The slightly more difficult inquiry is whether the "grubbing" was readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement.[3] Countrywide makes much of the fact that the grubbing work was done for the most part behind the houses, thereby limiting visibility. But the statute does not indicate that visibility of the improvement must be viewed from a particular perspective. In our opinion, the question is whether someone in the area of the improvement would clearly notice the improvement on reasonable inspection. Plaintiffs focus on the noise and visibility of the machinery used to do the work, but the statute does not speak of the visibility of the tools and machinery used in making the improvement, but instead the focus is on the visibility of the improvement. Of course, noisy and visible machinery would draw one's attention to an improvement being made. The trial court's opinion does not indicate what it considered as constituting "grubbing," but the evidence indicated that grubbing involved stripping the land of vegetation, brush, and trees. Donald Anderson, of Anderson Tree & Chipping Services, testified that "grubbing" included "brush hogging all the light brush and sawing the trees down and running them through a tree chipper into a semi trailer." The evidence indicated that clearing and grubbing are generally the first steps in the construction process.

Before continuing with our discussion, it is necessary to address whether the work done by Anderson in April 2001 can also be considered along with MacKenzie's grubbing work in June 2001. Plaintiffs argue that the priority of their construction liens relates back to work performed by Anderson in April 2001 and that Anderson's work constituted actual physical improvements to the parcels beyond the Staybridge area. In *M D Marinich, Inc v Michigan Nat'l Bank*, 193 Mich App 447; 484 NW2d 738 (1992), this Court, interpreting MCL

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[3] An "improvement" encompasses "clearing, demolishing, excavating, . . . altering, repairing, ornamenting, [and] landscaping." MCL 570.1104(7). However, the definition of "improvement" appears to be related to determining what activities may give rise to a construction lien, MCL 570.1107, as opposed to the definition of "actual physical improvement," MCL 570.1103(1), which pertains to priority under MCL 570.1119. It is unclear whether the definition of "improvement," MCL 570.1104(7), was intended to be incorporated into, or considered in examining, the definition of "actual physical improvement," MCL 570.1103(1). But even if one found that "grubbing" was an "improvement" under MCL 570.1104(7), it would still ultimately have to meet all of the criteria found in the definition of "actual physical improvement" because priority is the issue. Plaintiffs and amici place a great weight on the statutory definition of improvement; however, MCL 570.1103(1) must be satisfied.

570.1119(3) and (4), affirmed the trial court's ruling that the plaintiff contractor's construction lien on a building project related back to the first actual physical improvements made on the project by an earlier contractor; therefore, the plaintiff's lien had priority over the defendant bank's mortgage that was recorded after actual physical improvements were made by the first contractor but before work was done by the plaintiff contractor. *M D Marinich* controls our analysis.

There can be no dispute here that Anderson, MacKenzie, and Keystone were all working on the same project. The trial court ruled that MacKenzie's work could not relate back to Anderson's work because Anderson's work was completed in April 2001 and MacKenzie's labor with respect to areas outside the Staybridge area commenced in December 2001; therefore, the work begun by Anderson was no longer in "progress." It is difficult to understand the trial court's reasoning. First, the court itself found that MacKenzie did grubbing work in June 2001 on all of the parcels, including those outside the Staybridge area. Second, and aside from the grubbing, the evidence, as well as the trial court's own opinion, reflected that MacKenzie performed other infrastructure work outside the Staybridge area prior to December 2001. The trial court also ignored the decision in *M D Marinich* when analyzing the issue. Instead, the court relied on *Michigan Roofing & Sheet Metal, Inc v Duffy Rd Properties (On Remand)*, 100 Mich App 577; 298 NW2d 923 (1980), which is simply not on point. The trial court in essence required a showing of "timely progression." There does not appear to be a statutory basis for such a requirement. And, in *Williams & Works, Inc v Springfield Corp*, 408 Mich 732, 743; 293 NW2d 304 (1980), our Supreme Court stated that "mechanics' liens related back, even if other contractors started their work weeks or months later." Here, assuming a "timely progression" requirement, under the facts and the court's own finding that MacKenzie was grubbing all of the parcels in June 2001, we find that there was a timely progression of Anderson's work by MacKenzie and that the progression was continuing before the mortgages were recorded. With respect to Keystone, it can also rely on Anderson's work.[4]

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[4] This is a good point to briefly discuss the construction lien held by Keystone that was not, for reasons unknown, directly addressed by the trial court in the written opinion and judgment. Each contractor who provides an improvement to real property acquires a lien on the property. MCL 570.1107(1). An "improvement" is defined as "the result of labor or material provided by a contractor . . ., including, but not limited to, surveying, engineering and architectural planning, construction management . . . ." MCL 570.1104(7). As far as priority, MCL 570.1119 still controls, and the date of importance to Keystone was the date of the "first actual physical improvements." See *Williams & Works, supra*; MCL 570.1103(1)("actual physical improvement" does not include architectural or engineering planning or plan preparation). Thus, while providing architectural services constitutes an "improvement" giving rise to a construction lien, it is not considered an "actual physical improvement" for purposes of determining priority. Therefore, Keystone had to rely on the date of the first actual physical improvements as performed by MacKenzie or Anderson. Indeed, because Keystone was providing early planning services before any site work was done, Keystone can absolutely rely on Anderson's work, which put Keystone's plans into action. For this reason, it was imperative to consider whether Anderson's work constituted actual physical improvements.

We must next move on to the question whether Anderson's work constituted actual physical improvements to the property. Anderson engaged in extensive clearing and grubbing, including the cutting down of numerous trees, and Anderson also demolished homes on three of the parcels. Countrywide argues that tree clearing, grubbing, and the demolition of dilapidated houses do not constitute actual physical improvements. It argues that such work does not necessarily signal the beginning of construction, but instead is merely done to prepare a site for possible future construction, which may not ever happen. For example, a house may be demolished only because it is uninhabitable, not because a new structure will be constructed.

Countrywide's arguments are inconsistent with the definition of "actual physical improvements." Countrywide confuses "actual physical improvement," as defined above, with the actual commencement of construction via the building of a tangible, physical structure or product. Countrywide's arguments improperly preclude consideration of site preparation activities that alter the physical state of the site. MCL 570.1103(1) only requires a physical change in, or alteration of, the real property that is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. Therefore, the removal of trees, grubbing, and the demolition of houses, alone, can qualify as actual physical improvements, if readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement, regardless of whether there will be subsequent construction (building something) on the site where removal and demolition occurred. Construction site preparation activities can clearly fall within the ambit of "actual physical improvements." Grubbing, tree removal, and home demolition do not fall within the category of "labor which is provided in preparation for [a] 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). Grubbing, tree removal, and home demolition constitute the actual change or alteration itself, which may have been performed pursuant to preparatory surveys and plans.

We must ascertain whether Anderson's work was readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. We conclude that the demolition of houses constitutes a change or alteration to real property that would be readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. This would cover parcels E, L, and Y.[5] Thus, plaintiff's liens on these parcels have priority over the mortgages recorded in September 2001.

With respect to Anderson's grubbing and tree removal, Countrywide again argues that this work was done behind the houses for the most part; therefore, the work was not readily visible. For the reasons stated earlier, we disagree with this argument. Anderson's testimony reflected that there was extensive clearing and grubbing going on throughout the development site, which involved extremely noisy and easily visible work. His testimony indicated that numerous trees were cut down, with some stumps left behind and others removed. The record

[5] Although not entirely clear, it appears that Anderson also demolished a garage on either parcel I or J.

indicates that Anderson cut down trees and grubbed in all of the areas encompassed by the project.[6]

We conclude that when Anderson's tree clearing and grubbing and demolition of houses is viewed in conjunction with MacKenzie's grubbing work that took place on all of the parcels as found by the trial court, first actual physical improvements on all of the parcels occurred before the mortgages were recorded. Considering that heavy duty, visible, and noisy machinery and equipment were being utilized by Anderson and MacKenzie in the spring and summer of 2001 throughout the area, which would draw some attention to construction work being performed, and that clearing and grubbing work was going on relative to all of the parcels, some kind of notice should have been glaring to Countrywide before it executed and recorded the mortgages.

In light of our rulings above, it is unnecessary to address plaintiffs' argument regarding Countrywide's knowledge of construction activities prior to the recordation of the mortgages and an alleged duty to inspect. Further, it is unnecessary to address plaintiffs' argument regarding the effect of the mortgage foreclosure sales on the matter of priority.

We must next determine whether there was any error concerning the extent to which the construction liens attached to the parcels, i.e., to the entire interest or to the improvements only. MCL 570.1107(3) provides that "[e]ach contractor, subcontractor, supplier, or laborer who provides an improvement to real property to which the person contracting for the improvement had no legal title shall have a construction lien upon the improvement for which the contractor, subcontractor, supplier, or laborer provided labor, material, or equipment." Long did not have legal title to the parcels,[7] except parcel P, nor did any of Long's companies hold legal title, and it was one of Long's companies that was the actual contracting party. Accordingly, under the plain language of MCL 570.1107(3), plaintiffs' construction liens would appear to apply only to improvements; however, plaintiffs present an argument that we find meritorious.

Plaintiffs contends that each of the various owners who actually held legal title understood the nature of their involvement and consented to the improvements; therefore, their interests should be subject to the liens. Plaintiffs present an implied agency theory, essentially arguing that Long or Long's companies were acting as the titleholders' agents for purposes of contracting for the improvements, which would mean that the legal titleholders had contracted for the improvements. Therefore, the construction lien was on the entire interest of the owner. See MCL 570.1107(1).[8] In support, plaintiffs cite this Court's opinion in *Norcross Co v Turner-*

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[6] Countrywide argues that there was testimony that Anderson did not work on parcels N, O, P, and Q. However, the transcript citation given by Countrywide is to testimony by Long wherein he indicated that *MacKenzie* did not work on those parcels. Long did not testify that Anderson failed to work to work on parcels N through Q.

[7] The statute refers to "legal title," which would exclude Long who held an "equitable" interest in the parcels based on the multiple land contracts.

[8] We conclude that allowing application of an implied agency theory to the CLA is consistent with the necessity to construe the CLA liberally. MCL 570.1302(1).

Fisher Assoc, 165 Mich App 170; 418 NW2d 418 (1987), in which the Court utilized an implied agency theory in the context of determining whether the legal titleholder contracted for the improvements. The *Norcross Co* panel noted that an implied agency must "rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar." *Id.* at 181-182.

Initially, it is noted that plaintiffs did not timely raise the issue of an implied agency theory, and thus the trial court never addressed the argument in the written opinion and order. This Court, however, may overlook a preservation failure if manifest injustice would occur were the Court not to address the issue, if consideration of the issue is necessary to a proper determination of the case, or if the issue involves a legal question and the necessary facts for its resolution were presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Although not properly preserved, we hold that the implied agency issue may be considered as it is necessary for a proper determination of the case and it involves a legal question that can be answered as the necessary facts were presented below.

The only legal titleholders that testified at trial were Hinkle and Long. However, the evidence was abundantly clear that all of the legal titleholders acquiesced in Long's actions and conduct in pursuing the construction project and acquiesced in the construction improvements. Long worked in concert with the legal titleholders to acquire control of the property, whereby the titleholders would make a nice profit in purchasing the parcels by way of land contracts with Long that were for amounts greater than the mortgages obtained through Countrywide. In exchange, the legal titleholders gave Long complete freedom to commence construction activities. There was absolutely no indication to the contrary, and of course Hinkle (an owner of Keystone) and Long, as legal titleholders of some of the parcels, most certainly acquiesced in the construction.

Countrywide argues that, even if the issue of agency and the decision in *Norcross Co* are substantively considered, plaintiffs' failure to show that the improvements were "required" negates their agency argument. Countrywide misconstrues plaintiffs' argument. MCL 570.1107(1) provides:

> Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property shall have a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property, as described in the notice of commencement provided for by section 108 or 108a, the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has *required* the improvement. . . . [Emphasis added.]

The statute provides three different situations in which the interest of the owner or lessee may be attached by a construction lien. The final one envisions a scenario where an owner's interest is subject to a construction lien, despite the fact that the owner did not personally contract for the improvement, if the owner required the improvement. As maintained by defendants, there was no evidence of the legal titleholders requiring the improvement. This is not, however, the language upon which plaintiffs are relying. Rather, plaintiffs are relying on the first part of MCL 570.1107(1) that provides that the lien attaches to the interest of the owner or lessee who contracted for the improvement. Plaintiffs are merely arguing that the legal

titleholders contracted for the improvements by way of an agency theory, with them as the principals and Long or Long's companies as agent. Accordingly, legal titleholders through their agent contracted for the improvements, which preclude application of MCL 570.1107(3).

Because we hold that the construction liens attached to the entire real property interests, we need not address plaintiffs' arguments regarding the problems in determining the nature of the improvements that could be foreclosed upon.

Finally, attached as an appendix to their brief, and not in the brief itself, plaintiffs make a request for remand to a different judge. The basis for the argument, however, is essentially unhappiness with how the trial judge ruled in the case and displeasure at her refusal to acknowledge and address the issues in the motion for clarification and reconsideration. Plaintiffs contend that the trial judge would have difficulty putting aside her previously expressed views or findings.

Aside from the briefing problem by not properly presenting this issue in the format required by the court rules, there is no basis to reassign this case to another judge on remand. Reassignment to a different judge is appropriate "if the original judge would have difficulty in putting previously expressed views or findings out of his or her mind, if reassignment is advisable to preserve the appearance of justice, and if reassignment would not entail excessive waste or duplication." *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989). There is no record basis, under these governing factors, to conclude that reassignment should be ordered.

On remand, the trial court is directed to enter a judgment of foreclosure in favor of plaintiffs and to proceed in a manner consistent with MCL 570.1121.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff