



## When Does 90 Days Mean 90 Days?

Dirk H. Beckwith & Timothy P. Burkhard

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In a decision decided earlier this year, the Michigan Court of Appeals held that a contractor's construction lien was invalid because the contractor failed to record the lien within 90 days after the last furnishing of labor or material for the improvement. The key issue in the case was whether work performed by the contractor was "warranty work." Because "warranty work" is not considered an "improvement" under the Construction Lien Act, as interpreted by Michigan Courts, the 90-day filing period for a valid construction lien was not extended by the performance of the warranty work.

In the recent case<sup>1</sup>, a plumbing contractor performed underground and rough plumbing work on August 31, 2005 and finish plumbing work on August 4, 2006 and/or September 29, 2006. The plumber returned to the job site on two occasions after performing this work. On December 20, 2006, the contractor repaired a leak at the kitchen sink. On May 29, 2007, it repaired a small leak in a whirlpool tub and replaced the ball and cock assembly of a toilet. The plumbing contractor eventually filed its claim of lien on August 23, 2007. In the interim, a different contractor, who had also been involved on the same project, filed to foreclose its claim of lien.

The trial court found the plumber had completed its construction work in either August or September 2006 and its claim of lien filed on August 23, 2007 was, therefore, untimely and invalid. The plumber appealed that decision, asserting the work performed on May 29, 2007 was an "improvement" under the Construction Lien Act and that its lien was therefore timely.

The Court of Appeals agreed with the trial court and affirmed the trial court's dismissal of the lien. Although noting repair work can constitute an "improvement" and is specifically included in the definition of "improvement," the Court explained there is a difference between repair work that is specifically contracted for and repair work performed to correct problems with a contractor's work. In the previous decision of *Woodman v Walter*<sup>2</sup>, the Court of Appeals had held that where a contractor's performance of work was to correct deficiencies in

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### **AUTHORS/ CONTRIBUTORS**

Dirk H. Beckwith

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work performed or defects in fixtures installed ("warranty work") it was not an "improvement" under the Construction Lien Act. According to the Court, the distinguishing factor between a repair constituting an improvement and warranty work, the latter of which does not allow for the commencement of the 90-day filing period, **is whether the work in question conferred any value beyond the value furnished by completion of the original work.**

The Court found the plumbing contractor's work in December 2006 and May 2007 did not add any value beyond the value furnished in August or September 2006 - the repairs completed by the plumber merely provided what was originally contracted for: fully functional and properly functioning plumbing fixtures in a new house. That these repairs were "warranty work" was further bolstered by the plumber's description of the May 2007 work as "Warranty Service Call" and the fact that there was no evidence the plumber ever billed the general contractor for those additional services. Because the work performed was to repair minor deficiencies, it was properly classified as "warranty work" and did not extend the time period for filing a valid construction lien.

Contractors and others who perform work or provide materials on a construction project must ensure they file a lien within 90 days of the last day they perform work which adds value to the project and cannot rely on subsequent repair work to extend the time period to file a valid construction lien. The time period must be carefully monitored because the 90-day deadline is a strict requirement and is not subject to the substantial compliance provision of the Construction Lien Act. As the Court stated, "the ninety-day deadline means precisely ninety days."

If you have any questions, please contact Dirk Beckwith at 248.539.9918 or Timothy Burkhard at 248.785.4729.

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<sup>1</sup> *Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC*, \_\_\_ NW2d \_\_\_; 2011 WL 222143 (Jan 25, 2011).

<sup>2</sup> 204 Mich App 68; 514 NW2d 190 (1994).