

STATE OF MICHIGAN
COURT OF APPEALS

NORTHERN CONCRETE PIPE, INC.,

Plaintiff-Appellant,

v

SINACOLA COMPANIES - MIDWEST, INC.,
THE R. L. CORPORATION, and RAYMOND
LEDUC,

Defendants-Appellees.

UNPUBLISHED
October 23, 1998

No. 203322
Oakland Circuit Court
LC No. 95-491366-CK

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand for further proceedings.

In 1993, Sinacola Companies - Midwest, Inc.¹ entered into a contract with The R. L. Corporation to provide improvements to real property owned by R. L. Sinacola then subcontracted with plaintiff to supply labor and materials for the project. R. L. made its final payment to Sinacola. However, Sinacola did not pay plaintiff; instead Sinacola absconded with the money and later filed for bankruptcy. Plaintiff then filed suit against defendants, claiming that R. L. was liable on plaintiff's construction lien, that R. L. and its president, Raymond LeDuc, had violated the Builders' Trust Fund Act by receiving and retaining money intended for plaintiff, and that these actions constituted an intentional fraudulent conversion.

Defendants moved for summary disposition on all of plaintiff's claims. The trial court granted the motion under MCR 2.116(C)(8) and (10). Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief can be granted. *Spiek, supra*, p 337. A motion under MCR 2.116(C)(8) must be granted if no factual development could justify the plaintiff's claim for relief. *Spiek, supra*, p 337. MCR 2.116(C)(10), on the other hand, tests the factual support of a plaintiff's

claim. *Spiek, supra*, p 337. The court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material facts exists to warrant a trial. *Id.*

I

Plaintiff's first argument is that the trial court erred in granting defendants' motion for summary disposition regarding the construction lien pursuant to MCR 2.116(C)(8) because substantial compliance is provided for under the express language of the Construction Lien Act, MCL 570.1101 *et seq.*; MSA 26.316(101) *et seq.*, and plaintiff had substantially complied with the requirements for creating a valid lien.

Section 302 of the Construction Lien Act provides in pertinent part:

(1) 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. [MCL 570.1302; MSA 26.316(302).]

In *Brown Plumbing & Heating, Inc v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 183; 500 NW2d 733 (1993), our Supreme Court declared that § 302 is clear and unambiguous and that its express language provides that substantial compliance is applicable to the perfection of construction liens provided for in part one of the Construction Lien Act. This holding was reiterated in *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997), in which our Supreme Court stated that substantial compliance is sufficient to meet the provisions of part one of the Construction Lien Act.

In this case, plaintiff attempted to perfect an enforceable lien under part one of the act. MCL 570.1111; MSA 26.316(111); see also *Brown Plumbing, supra*, pp 183-184 ("Part 1 of the act establishes the procedures to acquire an enforceable construction lien on a particular piece of property; in other words, part 1 establishes the procedures to acquire a 'valid construction lien.'"). Under § 111(1), a subcontractor such as plaintiff has ninety days after it last furnished labor or material to record its claim of lien in the register of deeds. Here, plaintiff last furnished materials to the work site on November 10, 1993 and filed its claim of lien at the Oakland County register of deeds office on March 14, 1994. The trial court granted summary disposition to defendants on plaintiff's claim under the Construction Lien Act, finding that plaintiff failed to file the claim of lien within the ninety-day period, that the ninety-day period is not subject to the substantial compliance rule, and that R. L.'s failure to include the legal description of the property did not materially affect plaintiff's ability to timely file the lien.

We believe that the trial court erred in so ruling based on the Supreme Court's recent pronouncements in *Brown Plumbing* and *Vugterveen Systems*. First, it is clear that substantial compliance applies to part one of the Construction Lien Act. Second, we believe that plaintiff has established a material factual dispute regarding whether it substantially complied with the ninety-day filing period. Although the ninety-day period expired on February 10, 1994, and plaintiff properly filed

its claim of lien on March 14, 1994, there is evidence that plaintiff's attorney mailed the claim of lien on February 2, 1994 to the register of deeds office. The claim of lien was returned to the attorney twice by the register of deeds office, the second time requiring a complete legal description of the property. Plaintiff had relied on defendants' legal description. Although the trial court dismissed plaintiff's argument in this regard, we note that under the Construction Lien Act, the property owner is required to record the real property to be improved in the register of deeds office and the notice must contain the legal description of the real property. MCL 570.1108(2)(a); MSA 26.316(108)(2)(a).

Therefore, we find that plaintiff's attorney's deposition testimony in conjunction with defendants' failure to give the correct legal description of the real property and that the claim of lien was filed only one month after it was due, serves to create a material factual dispute regarding whether plaintiff substantially complied with part one of the Construction Lien Act. The trial court, therefore, erred in granting summary disposition to defendants with regard to plaintiff's claim to enforce a construction lien and we remand to the trial court for further proceedings on that claim.

II

Next, plaintiff argues that the trial court erred in finding that defendants were not acting in the capacity of general contractor and, therefore, were not subject to the terms of the Builders' Trust Fund Act, MCL 570.151; MSA 26.316(101), which provides:

In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors, or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

This Court has determined that the act does not impose a trust upon funds held by the owner. *Renshaw v Samuels*, 117 Mich App 649; 324 NW2d 117 (1982).

The act itself does not define contractor; however, the trial court determined that defendants were not acting as contractors. R. L. was the undisputed property owner.² Sinacola was the contractor it hired and with whom plaintiff dealt. Defendants, as owners and developers, then paid Sinacola under the construction contract. It was Sinacola who absconded with the money without paying plaintiff. Moreover, even if defendants were acting as general contractors for purposes of the Builders' Trust Fund Act, plaintiff still has no cause of action against defendants because plaintiff's contract was with Sinacola, who would then be considered a subcontractor of defendants. *KMH Equipment Co v Chas J Rogers, Inc*, 104 Mich App 563, 567-568; 305 NW2d 266 (1981) (the plaintiff had no civil remedy against the general contractor under the Builders' Trust Fund Act where its contract was with the subcontractor and not the general contractor).

Accordingly, the trial court did not err in granting defendants summary disposition with respect to plaintiff's claim under the Builders' Trust Fund Act.

III

Plaintiff lastly argues that the trial court erred in granting defendants' motion for summary disposition regarding its claim for conversion. However, an action cannot be maintained for conversion of money in Michigan unless there is an obligation on the part of the defendant to return the specific money entrusted to his care. *Garras v Bekiaries*, 315 Mich 141, 148; 23 NW2d 239 (1946); *Citizen's Ins Co v Delcamp Truck Center, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989). Because the trial court properly found that defendants were not trustees of money to be paid to plaintiff as a matter of law, there could be no conversion and plaintiff's complaint failed to state a claim upon which relief could be granted. Therefore, we find that the trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's conversion claim.

Affirmed in part, reversed in part, and remanded for further proceedings with respect to plaintiff's claim to enforce a construction lien. No taxable costs pursuant to MCR 7.219, none of the parties having prevailed in full.

/s/ Kathleen Jansen

/s/ Jane E. Markey

¹ Defendants R. L. Corporation and Raymond LeDuc note that the correct name of this company is Sinacola Midwest, Inc. Further, because Sinacola is in bankruptcy proceedings, it did not participate in this lawsuit or in this appeal. Therefore, use of the word "defendants" in this opinion will refer only to R. L. Corporation and Raymond LeDuc and does not include Sinacola.

² Plaintiff's attempt to show that R. L. was also the general contractor by relying on deposition testimony of LeDuc taken in a different case is unavailing because the court can only rely on the evidence *filed in the action* or submitted by the parties. MCR 2.116(G)(5). Moreover, it is certainly possible that defendants' position in the other case cited by plaintiff may not have been the same as in the present case.