STATE OF MICHIGAN

COURT OF APPEALS

TOTAL CONTRACTING, INC.,

Plaintiff-Appellant,

v

LOGAN DEVELOPMENT COMPANY, doing business as LOGAN DEVELOPMENT, INC.,

Defendant-Appellee.

UNPUBLISHED
December 29, 1998

No. 199517
Ingham Circuit Court
LC No. 95-079518 CK

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Plaintiff appeals by right from an order awarding $13,691.89 in attorney fees to defendant. The fee award was based on the trial court's determination that plaintiff's action to enforce a construction lien against defendant was "vexatious" under MCL 570.1118(2); MSA 26.316 (118)(2). We reverse.

"A trial court's finding that a claim is . . . vexatious is reviewed for clear error." *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). We review each case on its own particular facts and circumstances. *Id*. Although the statute in the Construction Lien Act allowing for attorney fees -- MCL 570.1118(2); MSA 26.316(118)(2) -- does not specifically define the term "vexatious," this term has been defined in a different context, that of enabling sanctions for improper appeals. MCR 7.216(C)(1) states in part as follows:

> The Court of Appeals may . . . assess actual and punitive damages . . . when it determines that an appeal or any of the proceedings in an appeal was vexatious because
>
> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
>
> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety,

> violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

Defendant here alleges that plaintiff's suit was vexatious because plaintiff failed to conduct a thorough inquiry regarding the accuracy of the legal description of the property in its claim of lien and, therefore, that the suit was "grossly lacking in the requirements of propriety." We disagree. There were three separate parcels of property, all owned by defendant's principals and without well-defined boundaries, located in the immediate vicinity. Although plaintiff did, in fact, fail to assert its lien on the correct property -- that on which most of the improvements in controversy were done -- some improvements *were* also done on the liened property. Further, defendant's principals had actual notice of the improvements being done on all of the parcels. Plaintiff here simply made a mistake by placing a lien on the wrong parcel of land, one that is easily understandable under the circumstances; there is no evidence at all of bad faith or extreme dereliction of responsibility. A determination that a filing is "vexatious" requires something more than an error of the sort which occurred here.[1]

Plaintiff further argues that, regardless of whether the lien action was vexatious, the trial court erred in awarding attorney fees to defendant because defendant was not the owner of the liened property. It also argues that the trial court erred in denying plaintiff's request for an evidentiary hearing on the issue of attorney fees. Since we have determined that the attorney fees were unwarranted given that the court clearly erred in finding the action vexatious, we need not address these claims.

Plaintiff raises three additional issues that are unrelated to the attorney fees. None of these issues, however, are properly before this Court since plaintiff expressly agreed in a settlement-related stipulation and order that his appeal would be limited to the issue of attorney fees. The stipulation stated "Plaintiff though wishes to appeal the Court's April 24, 1996 and September 18, 1996, Orders . . . limited to the issue of attorney's fees." "Where, as here, parties stipulate an arrangement that limits one party's rights to less than that which is otherwise required, that party may not later complain on appeal about this restriction." *Weiss v Hodge*, 223 Mich App 620, 636; 567 NW2d 468 (1997). In *Christensen v Christensen*, 126 Mich App 640, 644; 337 NW2d 611 (1983), we stated the following:

> [P]laintiffs stipulated in open court that they would not appeal the amount of attorney fees awarded, but only the propriety of the award itself. On appeal plaintiffs now attempt to challenge the amount of attorney fees awarded. The stipulation made in open court is binding upon plaintiffs and operates as a waiver on appeal.

Here, because plaintiff signed a stipulation agreement, which was subsequently incorporated into an order by the trial court, its appeal is limited to the issue of attorney fees.

Indeed, because we find the appeal in connection with these three issues encompassed by the stipulation to be so utterly devoid of merit in light of the stipulation, MCR 7.216(C)(1)(b), we remand this matter to the trial court for a determination of the attorneys fees incurred by

defendant on appeal, as well as in connection with the remand proceeding itself. MCR 7.216(C)(2). Plaintiff shall be responsible for reimbursing defendant for half of the attorney's fees which defendant incurred on appeal and for all of the fees which defendant incurred in connection with the remand proceeding. No costs shall be awarded here to either party.

Reversed and remanded for further proceedings in connection with this opinion. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] This conclusion is further supported, in our judgment, by the fact that the Construction Lien Act provides that "[s]ubstantial compliance with the provisions of [the Act is] sufficient for the validity of . . . construction liens." MCL 570.1302; MSA 26.316(302). See *Brown Plumbing & Heating v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 182-83; 500 NW2d 733 (1993).