

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PANELCLAD, INC.,

Plaintiff-Appellee,

v

LAFARGE CORPORATION and WATKINS  
ENGINEERS AND CONSTRUCTORS, INC.,

Defendants-Appellants.

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UNPUBLISHED

June 18, 1999

No. 204494

Alpena Circuit Court

LC No. 95-0001369 CK

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Defendants<sup>1</sup> appeal by right from the circuit court's order awarding plaintiff attorney fees in the amount of \$15,432.50 under the construction lien act (Act), MCL 570.1118(2); MSA 26.316(118)(2). We affirm in part and remand for an evidentiary hearing regarding the reasonableness of the attorney fees requested.

Plaintiff filed its complaint after defendant Watkins Engineers and Constructors (Watkins), a general contractor, and defendant LaFarge, the landowner, refused to pay for construction work plaintiff undertook on LaFarge's property, pursuant to a contract with Watkins. Watkins hired plaintiff as a subcontractor, agreeing to pay \$220,500.00 for plaintiff's services. The dispute concerned the quality of plaintiff's work and materials, the timeliness of performance, whether Watkins was within its rights under the contract in completing plaintiff's work,<sup>2</sup> and the amount of permissible backcharges.

Plaintiff filed a four-count complaint against defendants. Counts III and IV were dismissed (see n 1). Count I alleged that Watkins breached its contract with plaintiff and demanded full payment of the contract price plus interest, costs and attorney fees. Count II sought enforcement and foreclosure of plaintiff's construction lien. It alleged plaintiff's performance under the contract and compliance with the procedural requirements for enforcing and foreclosing the lien, and asked that the court determine the amount due plaintiff, determine the rights, claims, liens and priorities of the parties, and, in the event of default in payment of the amount determined, that the court order the property sold.

After the complaint was filed, defendants paid plaintiff \$110,500 but withheld the balance of the contract price. An amended complaint was filed acknowledging this payment, and after some pretrial activity, plaintiff and Watkins stipulated to submitting the matter to a special master. The special master issued findings and conclusions determining that Watkins was entitled to complete plaintiff's work on the project and withhold payment after plaintiff failed to remobilize within two days of Watkins' demand. He also determined that Watkins was entitled to some of the backcharges claimed, but not to others, leaving a balance of \$73,838.50 due to plaintiff.

The special master awarded no attorney fees under the contract, noting that Watkins had offered no evidence regarding attorney fees, and expressly stated that no ruling was being made regarding attorney fees pursuant to the construction lien act (Act), or the mediation or offer of judgment rules. The circuit court entered a partial judgment for plaintiff against Watkins based on the special master's findings and conclusions. The judgment awarded plaintiff attorney fees in an unspecified amount subject to Watkins' right to file objections. Defendants<sup>3</sup> objected to an award of attorney fees under the Act, arguing that attorney fees were not allowable under the Act because the fees requested pertained only to the contract claim against Watkins and not the foreclosure claim, and also argued that the fees proposed were unreasonable. The circuit court requested written memoranda of law explaining the parties' positions, and subsequently awarded plaintiff the full amount of attorney fees sought, \$15,432.50.

The construction lien act allows recovery of attorney fees:

[i]n each action in which enforcement of a construction lien through foreclosure is sought, the court shall examine each claim and defense that is presented, and determine the amount, if any, due to each lien claimant . . . . The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. [MCL 570.1118(2); MSA 26.316(118)(2).]

The Act was intended to protect the interests of contractors, workers, and suppliers while protecting owners from excessive costs, and is to be liberally construed to effectuate these purposes. *Vugterveen Systems Inc v Olde Millpond Corp*, 454 Mich 119-121; 560 NW2d 43 (1997).

The Act permits lien foreclosure and breach of contract claims to be brought together:

(5) In connection with an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose. [MCL 570.1117(5); MSA 26.316(117)(2).] [See also *Dane Const, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287; 480 NW2d 343 (1991) (noting that enforcement of a construction lien through foreclosure is a cumulative remedy that may be pursued simultaneously with an action on the contract from which the lien arose).]

The Act contemplates joining all potential lien claimants and the court adjudicating their interests. See MCL 510.1118(2); MSA 26.316(118)(2), which states that "the court shall examine each claim and defense that is presented, and determine the amount, if any, due to each lien claimant."

Here, Watkins and LaFarge were both defendants in Count II, the foreclosure of lien count, and both were represented by the same counsel. The issues were intertwined in the sense that in order to determine the amount of plaintiff's lien, if any, it was necessary to determine the amount owed under the contract. Although the validity of the lien was not the subject matter of the proceedings before the special master, the parties stipulated in those proceedings that "the procedural requirements of the lien filed by Panelclad against the LaFarge property were proper." The disputed issue concerned the amount of permissible backcharges, and because that dispute apparently was between plaintiff, the subcontractor, and Watkins, the contractor, the property owner did not participate in the proceedings before the master. Nevertheless, the foreclosure count remained pending as a means of securing payment, and a release of lien was not filed until after the amount the special master determined was owing was paid. Under these circumstances, the circuit court did not err in awarding fees under the Act.<sup>4</sup>

Defendants further assert that plaintiff did not prevail on the lien claim because it was not adjudicated and, further, that since the master determined that plaintiff was in default and that Watkins properly completed the contract, plaintiff was not a prevailing party at all. We disagree. A "prevailing party" is "a party who wins on the whole record." MCL 600.2591(3)(b); MSA 27A.2591(3)(b). When a plaintiff pleads different theories, each of which seeks to recover for the same injury, and recovery under any theory would entitle the plaintiff to recover the full measure of its damages, the plaintiff need only recover on one theory to be considered the prevailing party. *Van Zanten v H. Vander Laan Co, Inc*, 200 Mich App 139, 141; 503 NW2d 713 (1993). Although the complaint alleged two distinct claims and plaintiff's claim seeking foreclosure on a construction lien was never addressed, plaintiff prevailed on the whole record and was therefore a "prevailing party" who had "sought" enforcement of a lien within the meaning of the Act. MCL 570.1118(2); MSA 26.316(118)(2).

Further, a party need not recover the full amount of damages prayed for to be considered a prevailing party. *VanZanten, supra* at 141. We have found no authority to support that a plaintiff cannot prevail in a breach of contract action unless it is expressly stated in a court judgment that the defendant breached its contract. Here, although it was determined that Watkins properly completed the work and was entitled to backcharges, it was also determined that the backcharges claimed were excessive and that plaintiff was owed money under the contract.

Defendants provide no authority to support and did not argue below that the circuit court failed to reserve the right to grant attorney fees other than as a result of mediation or offers of judgment. We have found no support for the proposition that the circuit court had to reserve the right to award attorney fees under the Act. Litigants may not expect this Court to search for authority to support their positions. *Winiemko v Valenti*, 203 Mich App 411, 415, 419; 513 NW2d 181 (1994).

## II

Defendants next argue that the circuit court erred when it failed to hold a hearing to consider the reasonableness of plaintiff's requested attorney fees. We agree.

Where the opposing party challenges the reasonableness of attorney fees requested, the court should inquire into the services actually rendered prior to approving an amount. Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is. *Wilson v General Motors Corp*, 183 Mich App 21, 42-43; 454 NW2d 405 (1990). The court must make findings of fact on the issue whether the fees are reasonable. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 32; 335 NW2d 710 (1983), citing *Sturgis Savings & Loan Ass'n v Italian Village, Inc*, 81 Mich App 577; 265 NW2d 755 (1978). Although the parties submitted memoranda on the issue of attorney fees and a hearing was held on the general issue whether fees were appropriate under the Act, the circuit court did not state any findings on the record and did not discuss the reasonableness of the fees sought.

When a party claims that attorney fees are excessive, and the circuit court fails to consider the reasonableness of the fees, instead finding the bill acceptable on its face, the court has abused its discretion. *Petterman, supra* at 33. We therefore remand for a determination of reasonable attorney fees. In determining a reasonable fee, the circuit court should consider the factors set forth in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). *B & B Investment Group v Gitler*, 229 Mich App 1, 15-17; 581 NW2d 17 (1998).

We affirm the circuit court's determination that attorney fees could properly be awarded under the construction lien act, but remand for an evidentiary hearing on the issue of the reasonableness of the attorney fees requested.<sup>5</sup> We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Barbara B. MacKenzie

/s/ Helene N. White

<sup>1</sup> Although the claim of appeal and brief on appeal were filed in behalf of both defendants, and the case is titled in that fashion in this Court, it is unclear whether the order at issue pertained to both defendants, or just Watkins. It is also unclear whether the case is properly before us on a claim of appeal. Plaintiff's amended complaint contained four counts. Count I alleged breach of contract against Watkins; Count II asserted a statutory construction lien and sought determination of the rights of all parties; Count III alleged unjust enrichment against LaFarge; and Count IV alleged unjust enrichment and quantum meruit against Watkins. Count II was dismissed by an order granting partial summary disposition, as was Count IV. Plaintiff and Watkins resolved their dispute, with the exception of the attorney fee issue, through proceedings before a special master, and the circuit court entered a partial judgment against Watkins leaving open the attorney fee issue. The June 17, 1997 opinion and order resolving the attorney fee issue does not refer to either defendant specifically, but refers to "defendant" rather than "defendants." There is no order purporting to dispose of the lien claim. The record does contain a notice of satisfaction of the partial judgment against Watkins, and a release of lien, but both were filed after the claim of appeal. Recognizing that the claim of appeal may have been improper, we address the issues as on leave granted.

<sup>2</sup> The contract called for completion of plaintiff's work by October 7, 1994. On November 16, 1994, Watkins sent a default notice to plaintiff and, pursuant to its rights under the contract, demanded that plaintiff remobilize within two days and complete the project. Plaintiff did not remobilize and Watkins completed plaintiff's work on its own.

<sup>3</sup> The objections appear to have been filed in behalf of both defendants.

<sup>4</sup> We further observe that this Court has held that the right to attorney fees is not defeated by payment in response to a lien foreclosure action. See *Bosch v Altman Const Corp*, 100 Mich App 289, 296-297; 298 NW2d 725 (1980), (noting that "it would clearly violate the spirit of the mechanics' lien statute to permit a lienor to force a lienor to accept payment of a lien claim just before the commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees," and concluding that "a lienor is not required to accept tender of payment after a complaint has been filed if he wishes to pursue his statutory right to attorney fees.") When plaintiff first filed this action, the amount owed under the contract and asserted as a lien amount was \$220,500. Defendants tendered \$110,500 of it after the complaint was filed. The balance determined to be owing was later paid in satisfaction of the partial judgment. Defendants argue that because the lien claim was never adjudicated and the lien was never foreclosed, fees were not incurred under the Act. However, it was only defendants' payment in response to the action that obviated the need for further proceedings to foreclose the lien.

<sup>5</sup> The court shall make clear whether the order entered on remand applies to both defendants or only one.