

STATE OF MICHIGAN
COURT OF APPEALS

B & W LANDSCAPE & PATIO SUPPLY, INC.,

Plaintiff-Appellee,

v

LYNN VINEYARD and COLLEEN EMERSON
VINEYARD,

Defendants-Appellants,

and

KEVIN ROLL, KK ROLL CONSTRUCTION, and
MACOMB SCHOOLS and GOVERNMENT
CREDIT UNION,

Defendants.

UNPUBLISHED
September 28, 2001

No. 221178
Macomb Circuit Court
LC No. 98-002508-CK

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Following a two-day bench trial, the circuit court awarded plaintiff a judgment of \$10,327.74, which included the verdict of \$571.34 plus attorney fees and costs of \$9,756.40. Defendants Lynn Vineyard and Colleen Emerson Vineyard¹ appeal as of right. We affirm.

I. Facts and Proceedings

Plaintiff's claims against defendants arose out of an unpaid invoice for \$571.34 worth of crushed limestone delivered to defendants' building site on October 11, 1997, where they were in the process of building a house. Defendants did not challenge the value of the limestone; instead, they refused to pay the invoice because they claimed plaintiff had overcharged them for a

¹ The remaining defendants were named merely in order to comply with the construction lien act, MCL 570.1101 *et seq.* They did not participate in the litigation below, and are not involved in this appeal. Thus, for ease of reference, "defendants" refer to the Vineyards only.

previous delivery and that plaintiff had agreed to provide the \$571.34 shipment free of charge in order to compensate for the previous overcharge. In contrast, plaintiff alleged that it had already reimbursed defendants for the overcharge and that it at no time agreed to provide additional shipments of limestone at no charge.

Plaintiff originally sought reimbursement from defendants through a small claims action, however, after defendant removed the case from small claims court to district court, plaintiff filed a complaint in circuit court, based on breach of contract and unjust enrichment, seeking to foreclose on defendants property pursuant to a construction lien. Defendants then filed a countercomplaint alleging counts of misrepresentation and violations of the consumer protection act.

Defendants then moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) arguing that because plaintiff had no written contract it could not file a lien against residential property under MCL 570.1114. In response, plaintiff argued that since it was not a contractor and was instead a supplier, MCL 570.1114 did not apply. The circuit court agreed with plaintiff; accordingly, it denied defendants' summary disposition motion.

Following trial, the circuit court found plaintiff's position to be more credible than that of defendants and rejected defendants' claim that plaintiff agreed to deliver the limestone in lieu of refunding an overpayment. The trial court also found that that plaintiff was not a contractor with regard to the delivery of the limestone, but rather a supplier, and that plaintiff was not required to have a written contract with defendants in order to assert a lien under the construction lien act, MCL 570.1101 *et seq.* Further, the trial court found that there had been an agreement between plaintiff and defendants to deliver limestone, that this agreement was a contract, and that defendants breached the contract by failing to pay. The trial court also rejected defendants' counterclaims, finding insufficient evidence to support them. Finally, the trial court found that "based on the testimony and exhibits at trial, pursuant to MCL 570.1118(2) . . . plaintiff is entitled to an award of attorney fees and costs in the amount of \$6,962.50 . . . plus \$2,793.90 for trial and supplemental filings and costs."

II. Standard of Review

This Court's review of a trial court's factual findings is for clear error. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001); *Grand Rapids v Green*, 187 Mich App. 131, 135-136; 466 NW2d 388 (1991); see also MCR 2.613(C). In addition, statutory interpretation is a question of law which we review de novo. *Adams v Linderman*, 244 Mich App 178, 184; 624 NW2d 776 (2000); *Smeets v Genesee Co Clerk*, 193 Mich App 628, 633; 484 NW2d 770 (1992). Further, a trial court's decision regarding the reasonableness of attorneys fees is reviewed for an abuse of discretion. *In re Attorney Fees and Costs*, 233 Mich App 694, 705; 593 NW2d 589 (1999); *Vugterveen Systems Inc v Olde Millpond Corp*, 210 Mich App 34, 46; 533 NW2d 320 (1995) (*Vugterveen I*), reversed on other grounds *Vugterveen v Olde Millpond Corp*, 454 Mich 119; 560 NW2d 43) (*Vugterveen II*).

III. Analysis

Defendants first argue that the trial court erred when it found that plaintiff was not a contractor under § 114 of the construction lien act. We disagree.

The evidence at trial established that plaintiff did not perform any work for defendants at the time of the limestone delivery on October 11, 1997, but instead simply delivered limestone pursuant to an oral contract between plaintiff and defendants. By delivering the limestone, plaintiff “provide[d] material. . . used in the improvement of real property.” MCL 570.1106(5). The fact that plaintiff had performed some grading work for defendants in September of 1997, was irrelevant to the § 114 inquiry here, since that work had been completed and paid for weeks before the limestone delivery in question. The record, therefore, supports the trial court’s finding that plaintiff was a supplier rather than a contractor with regard to the disputed limestone bill. *Id.*² Further, because MCL 570.1114 specifically refers to contractors and does not limit the ability of suppliers to assert a lien against residential property in the absence of a written contract, the trial court did not err when it determined that § 114 was not a bar to plaintiff’s claim in the instant case.³

Defendants also argue that the trial court erred when it determined that defendants breached an oral contract with plaintiff. Again, we disagree.

The essential elements of a contract are “parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.” *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Here, the evidence showed that there was a mutuality of agreement, or a meeting of minds between the parties, and that the parties’ agreement resulted in a mutuality of obligation. *Reed v Citizens Ins Co*, 198 Mich App 443, 449; 499 NW2d 22 (1993). Therefore, the trial court did not clearly err by finding that an oral contract existed between the parties for the sale and delivery of limestone and that defendants breached the contract by not paying. *Adams, supra; Smeets, supra.*

² MCL 570.1106(5) provides:

“Supplier” means a person who, pursuant to a contract with a contractor or a subcontractor, leases, rents, or in any other manner provides material or equipment which is used in the improvement of real property.

In this regard, we note that this Court has recently stated that a “residential owner may act as a residential contractor on [his or] her own property.” *Stokes v Millen Roofing Co*, 245 Mich App 44, 60; 627 NW2d 16 (2001). Thus, because plaintiff provided the limestone to defendants, who were the owners of the residential property, and the trial court found defendants to be the contractors, we find that § 106(5) of the construction lien act appropriately describes plaintiff’s relationship to defendants in this case.

³ MCL 570.1114 provides, in part:

A contractor shall not have a right to a construction lien upon the interest of any owner or lessee in a residential structure unless the contractor has provided an improvement to the residential structure pursuant to a written contract.

Finally, defendant argues that the trial court abused its discretion by awarding plaintiff unreasonable attorney fees and costs. We disagree. The record in this case reveals that plaintiff offered a detailed billing statement as evidence, that defense counsel affirmatively stated defendants had no objections to the billing statement, and that, accordingly, the trial court admitted the statement into evidence. The record further establishes that defendants did not introduce contradictory evidence as to the reasonableness of the fees charged, or cross-examine in an effort to impeach plaintiff's evidence regarding the reasonableness of the fees. Therefore, defendants' actions at trial resulted in both forfeiture (e.g., by failing to timely assert a defense as to the reasonableness of the fees), and waiver (e.g., by affirmatively stating that defendant had no objections to the disputed billing statement), of this issue. See *Stein v Braun Engineering*, 245 Mich App 149, 154; 626 NW2d 907 (2001) and *Greathouse v Rhodes*, 242 Mich App 221, 232 nn 5, 6; 618 NW2d 106 (2000).

Nonetheless, we take the opportunity to note that 242 under § 118(2) of the lien act, the trial court is entitled to provide "reasonable attorneys' fees to a lien claimant who is the prevailing party." MCL 570.1118(2). As we previously noted, the record establishes that plaintiff presented a detailed billing statement into evidence and that defendants failed to contest, in any way, the accuracy or reasonableness of that billing statement. Defendants argument here that the fees and cost award was unreasonable because the amount of the award greatly exceeded the amount of the lien cannot, given the record below, establish that the trial court abused its discretion. Cf. *Vugterveen II, supra* at 133. We also note that plaintiff originally filed its complaint in small claims court, an appropriate setting for resolving a \$571.34 dispute, that defendants chose to remove the action from small claims court, forcing plaintiff to retain counsel to litigate this matter, and that defendants escalated the conflict and expenses by filing their countercomplaint. Under these circumstances, we find the trial court's award to be entirely reasonable. See *Michigan Dep't of Transportation v Randolph*, 461 Mich 757, 766; 610 NW2d 893 (2000) and MRPC 1.5(a) (indicating the factors that judges and attorneys should consider when determining the reasonableness of fees).

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder