STATE OF MICHIGAN

COURT OF APPEALS

WESCO DISTRIBUTION, INC.,

Plaintiff-Appellant,

v

FIRST AMERICAN ELECTRIC SUPPLY COMPANY,

Defendant/Cross-Plaintiff/Cross-Defendant,

and

GERALD MORRIS,

Defendant/Cross-Defendant,

and

FRANKLIN CAPITAL CORPORATION,

Defendant-Appellee,

and

DIMMITT & OWENS FINANCIAL, INC.,

Defendant/Cross-Defendant-Appellee,

and

CRESTMARK FINANCIAL CORPORATION,

Defendant/Cross-Plaintiff-Appellee,

and

UNPUBLISHED
January 29, 2002

No. 221748
Oakland Circuit Court
LC No. 98-005532-CK

ALLSTATE FINANCIAL CORPORATION, COMMERCE FUNDING CORPORATION and CFC FUNDING CORPORATION,

Defendants.

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants Franklin Capital Corporation ("Franklin"), Dimmitt & Owens Financial, Inc. ("Dimmitt"), and Crestmark Financial Corporation ("Crestmark"). We affirm.

Plaintiff first argues that the trial court erroneously granted summary disposition in favor of Franklin, Dimmitt, and Crestmark pursuant to MCR 2.116(C)(8) and (C)(10). We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint itself and may not be supported with documentary evidence. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). A motion for summary disposition under MCR 2.116(C)(8) should be granted when, viewing the evidence in the light most favorable to the nonmoving party and accepting all factual allegations as true, the claim is so unenforceable as a matter of law that no factual development could justify a right of recovery. *Id*. Furthermore, when reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact, entitling the moving party to judgment as a matter of law. *Id*.

Wesco argues that defendant First American Electric Supply Company ("First American") was a subcontractor within the meaning of the Michigan Builders Trust Fund Act ("MBTFA"), MCL 570.151 *et seq*. Wesco therefore argues that, under the MBTFA, First American held certain funds in trust for the benefit of Wesco. The MBTFA "applies to those funds paid to contractors and subcontractors for products and services provided under construction contracts." *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 47; 631 NW2d 59 (2001). In order to present a prima facie claim under the MBTFA, a plaintiff must first demonstrate that the party that received the funds in question "is a contractor or subcontractor engaged in the building construction industry." *Id*. at 49. Thus, Wesco's claim hinges on whether First American qualifies as a contractor or subcontractor within the meaning of the MBTFA.

The MBTFA does not explicitly define the terms "contractor" and "subcontractor." However, the Construction Lien Act ("CLA"), MCL 570.1101 *et seq*., does define those terms. Defendants argue that this Court should apply the definitions found in the CLA. Plaintiff argues

that we should ignore the CLA and should consult only the common lay understanding of the term "subcontractor." The primary goal of judicial statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998); *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). When a statute does not define a term, we will ascribe its plain and ordinary meaning. *Western Michigan Univ Bd of Control v State of Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). However, statutes relating to the same subject matter or sharing a common purpose are in pari materia and must be read together, even though the statutes were enacted at different times and contain no reference to each other. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Michigan Bell Telephone Co*, 374 Mich 543, 558; 132 NW2d 660 (1965).

The purpose of the CLA is to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 393-394; 594 NW2d 81 (1999), quoting *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997). The purpose of the MBTFA is to protect subcontractors from financially irresponsible general contractors, by creating an alternative remedy to that contained in the CLA. *DiPonio*, *supra* at 49. The CLA and the MBTFA relate to the same subject matter because they both pertain to the construction industry. Moreover, the common purpose of each statute is to protect the interests of those involved in the industry. *Id.*; *Erb Lumber*, *supra* at 393-394. Because the statutes share a common purpose and pertain to the same subject matter, we shall apply the explicit definitions contained in one statute to the undefined terms contained in the other.

The CLA defines a "contractor" as "a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property." MCL 570.1103(5). The CLA defines a "subcontractor" as "a person, other than a laborer or *supplier*, who pursuant to a contract between himself or herself and a person other than the owner or lessee performs any part of a contractor's contract for an improvement." MCL 570.1106(4) (emphasis added). Moreover, the CLA defines a "supplier" as "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." MCL 570.1106(5).

First, it is undisputed that First American did not provide an improvement to any real property. Therefore, First American does not qualify as a contractor within the meaning of the CLA and the MBTFA. Second, in its complaint, Wesco admitted that First American was in a business similar to that of Wesco and that Wesco was in the business of selling a variety of electrical supplies, parts, fixtures, and related materials. Wesco did not allege that First American did anything other than provide materials. Therefore, we conclude that First American was a supplier pursuant to MCL 570.1106(5). Because the definition of "subcontractor" enunciated in the CLA excludes suppliers, First American was not a subcontractor within the meaning of the CLA and the MBTFA. MCL 570.1106(4). Because First American was neither a contractor nor subcontractor, no trust fund was created pursuant to the MBTFA. Accordingly,

the trial court's grant of summary disposition in favor of Franklin, Crestmark, and Dimmitt on the basis under MCR 2.116(C)(8) was proper.[1]

Wesco also argues that the trial court erroneously denied its motion to amend its complaint. However, a review of the lower court record reveals that Wesco never filed a motion to amend its complaint. Rather, in its reply brief in opposition to Franklin's, Dimmitt's, and Crestmark's motions for summary disposition, Wesco simply stated that it "moves, pursuant to MCR 2.116(I)(5) and MCR 2.118 to amend its Complaint accordingly." Wesco failed to mention its "motion" to amend its complaint at oral argument on Franklin's, Dimmitt's, and Crestmark's motions for summary disposition. While the trial court acknowledged Wesco's desire to amend its complaint in its order granting defendants' motions, it did not address this issue. Because Wesco failed to properly file a motion to amend its complaint, it did not obtain an adverse ruling on such a motion, and there was no decision in the lower court from which Wesco can seek appellate review.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[1] Given our resolution of this issue, we need not decide whether defendants qualified as bona fide purchasers of First American's accounts.