STATE OF MICHIGAN

COURT OF APPEALS

CITADEL CORPORATION,

Plaintiff/Counterdefendant-Appellee,

v

EASTBANK ASSOCIATES LIMITED PARTNERSHIP and UNITED DEVELOPMENT REAL ESTATE CORPORATION,

Defendants/Cross-Defendants,

and

NATIONAL PRECAST, INC.,

Defendant/Cross-Plaintiff/Counterplaintiff-Appellant.

UNPUBLISHED
September 20, 2002

No. 223308
Kent Circuit Court
LC No. 92-076542-CH

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant National Precast, Inc., appeals as of right from an order granting plaintiff Citadel Corporation's motion for summary disposition and denying National Precast's motion for summary disposition. We affirm in part, reverse in part, and remand.

I. Basic Facts And Procedural History

Citadel was the general contractor for a project involving the construction of Eastbank Waterfront Towers in Grand Rapids, a high-rise complex owned by Eastbank Associates Limited Partnership (Eastbank). National Precast was a subcontractor. The contract between Citadel and National Precast included a pay-when-paid clause providing that progress payments and final payments did not become due to the subcontractor, National Precast, until the contractor, Citadel, received payment from the owner, Eastbank. The contract itself stated:

> 5.1 Progress Payments will be made to Subcontractor on or about the 25th day of each month, in an amount equal to 90 percent of the value of labor and materials incorporated by Subcontractor in the Work and, where authorized by the

> Contract Documents, of materials stored on the Project site or other location agreed upon in writing, in a manner acceptable to Owner, Architect and Contractor, less the aggregate of previous payments, *but such Progress Payments shall not become due Subcontractor unless and until Contractor receives payment for such Work from the Owner*.
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> * * *
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> 6.3 In addition to any other requirements of this Subcontract and the Contract Documents, *Final Payment shall not become due unless and until the following conditions precedent to Final Payment have been satisfied;* (a) approval and acceptance of Subcontractor's Work by Owner, Architect and Contractor, (b) delivery to Contractor of all manuals, "As-Built" Drawings, guarantees, and warranties for materials and equipment furnished by Subcontractor, or any other documents required by the Contract Documents, *(c) receipt of Final Payment for Subcontractor's work by Contractor from Owner*, (d) furnishing to Contractor of satisfactory evidence by Subcontractor that all labor and material accounts incurred by Subcontractor in connection with its Work have been paid in full, (e) furnishing to Contractor a complete Affidavit, Release of Lien and Waiver of Claim by Subcontractor as required by the Contract Documents.[1]

This suit began when Citadel sued Eastbank for payment for work done on that project. Pursuant to the Construction Lien Act, all subcontractors, including National Precast, were brought into the lawsuit between Citadel and Eastbank.[2] National Precast filed a cross- and counter-complaint against Eastbank and Citadel, respectively, for foreclosure of the construction lien in early March 1993. National Precast also alleged breach of the construction contract and sought recovery under the Builders Trust Fund Act.[3] National Precast asked for costs, interest, and attorney fees.

According to the record, National Precast made its first offer of judgment no later than 1993. Citadel rejected the offer and made a counteroffer. National Precast rejected the counteroffer and made its own counteroffer. At some point, the parties reached an agreement, which they placed on the record at a hearing on March 12, 1996. The attorneys made only brief statements at this hearing. According to Citadel's attorney, the parties agreed to settle their primary dispute, National Precast had agreed to waive any interest or attorney fees stemming from the offer of judgment process, but the parties had not resolved National Precast's claim for other attorney fees and interest, which would be decided at a later time. Citadel's attorney did not mention the amount of the settlement at the hearing, but representatives for Citadel and National Precast affirmed the settlement on the record. Importantly, however, Citadel's November 1995 motion for summary disposition of National Precast's request for attorney fees and interest remained pending following this hearing.

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[1] Emphasis added.

[2] MCL 570.1117(4).

[3] MCL 570.151 *et seq*.

In July 1996, Citadel and National Precast placed their partial settlement agreement on the record. The parties agreed to settle their dispute under the contract for $54,500, but reserved interest and attorney fees as issues to settle later. Citadel moved again for summary disposition on these issues, arguing that National Precast was not entitled to any interest at all, but if it were entitled to interest, the interest should be computed from "the time that Citadel got paid by Eastbank." In support for this argument, Citadel cited the "pay-when-paid" clause in its subcontract with National Precast and *Berkel v Christman Co*,[4] which held that these clauses are enforceable.[5] Citadel also argued that the subcontract with National Precast did not address attorney fees, which meant that it was not entitled to the fees.

National Precast responded that its claims fell under the Construction Lien Act,[6] the subcontract, and the Builder's Trust Fund Act,[7] while Citadel's arguments only implicated the contract claim. National Precast claimed that it was entitled to attorney fees under its separate Construction Lien Act claim. Further, it contended, attorney fees are part of the lien, not part of money damages. National Precast distinguished *Berkel* on the basis that, in *Berkel*, a construction lien act claim was settled and Berkel received payment,[8] so the case before this Court involved only a contract with a pay-when-paid clause, which this Court held was enforceable. National Precast argued that a decision on interest by the trial court in this case was premature until the trial court could determine (1) which party prevailed, and (2) under which claim the amounts would be paid.

The trial court concluded that the *Berkel* case controlled National Precast's construction lien claim, so it summarily disposed of that claim and simply stated, "There is no interest or attorney fees here and that the claim by National Precast is premature." National Precast's attorney, who had argued in briefs that National Precast was entitled to the full measure of interest and attorney fees available under the relevant statutes, attempted to minimize the trial court's ruling, saying, "Your Honor, one point of clarification. Is the Court also awarding no interest or attorney fees for the period from the time . . . Citadel received payment and the time this matter came to trial [sic]?" Citadel's attorney responded that it was his "understanding that we [Citadel] were going to pay them [National Precast] interest from the date that Citadel got payment until it [National Precast] was paid." The trial court evidently agreed to this alternative compromise on interest, but stated that it saw "no provision here by statute or by contract that would allow attorney fees."

In August 1996, National Precast moved for entry of judgment. The proposed judgment National Precast submitted with its motion would have: (1) awarded National Precast $54,500, but acknowledged that Citadel had already paid that amount on an undisclosed date; (2) denied National Precast attorney fees; (3) awarded National Precast the twelve-percent money judgment interest rate calculated from the date Eastbank paid Citadel until Citadel paid any remaining

[4] *Berkel v Christman Co*, 210 Mich App 416; 533 NW2d 838 (1995).

[5] *Id*. at 418-420.

[6] MCL 570.1101 *et seq*.

[7] MCL 570.151 *et seq*.

[8] This is not factually correct. See *Berkel*, *supra* at 418.

amounts; and (4) awarded an undetermined amount of taxable costs, including costs "assessed for the special mediation process ordered in the case." Citadel, however, filed an objection to the proposed judgment. According to Citadel, the parties had agreed to $54,500 as the amount of settlement, but had not agreed to a judgment entered on that amount. Citadel submitted a proposed order, which the trial court eventually signed with a single modification. That order stated:

> IT IS HEREBY ORDERED as follows:
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> 1. For the reasons set forth in this Court's oral opinion given from the Bench on July 29, 1996, Citadel's Motion for Summary Disposition is granted and National Precast's Motion for Summary Disposition is denied.
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> 2. National Precast is awarded no attorney fees.
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> 3. National Precast is awarded interest at the applicable statutory rate in Michigan from the date Citadel was paid by East Bank [sic] (April 24, 1995), until Citadel paid National Precast (March 28, 1996), on the $54,500.00 settlement amount paid to National Precast to Citadel, for a total interest amount of $3,898.49.
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> [inserted by hand:]
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> 4. No costs awarded.

Subsequently, the trial court denied National Precast's motion for reconsideration.

II. Standard Of Review

All the issues presented in this case are questions of law, which this Court reviews de novo.[9]

III. Contract Claim

According to National Precast, the trial court erred in dismissing its contract claim not only because this case is distinguishable from *Berkel*, but also because public policy bars the pay-when-paid clause in the contract. This case differs from the facts in *Berkel* in some respects. However, the pertinent aspect of *Berkel* is the pay-when-paid clause at issue in that case, which is substantially the same as the pay-when-paid clause in this case.[10] Thus, we see no reason to refrain from applying *Berkel's* holding that a pay-when-paid clause is valid and enforceable in this case. Nor is there any merit in National Precast's public policy argument. Even the Construction Lien Act, MCL 570.1115(5), recognizes circumstances under which it is proper to reserve payment until a condition precedent occurs. As the analysis in *Berkel* suggested, the law generally favors allowing the parties to a contract to agree on the terms of their legal

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[9] See *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

[10] See *Berkel*, *supra* at 418.

relationship, including payment.[11] Accordingly, we conclude that it is not against the public policy of this state to permit the parties to set payment terms, including requiring payment from a third-party as a condition precedent to payment to a subcontractor.[12] Therefore, the trial court did not err when it determined that *Berkel* controlled its decision with respect to the contract claim and mandated summary disposition for this claim.

IV. Construction Lien Claim

Whether *Berkel* properly supported the trial court's decision to dispose of National Precast's claim under the Construction Lien Act[13] presents a completely separate question.[14] The Construction Lien Act[15] is remedial legislation[16] that sets forth a comprehensive scheme aimed at securing payment for the individuals and businesses that perform construction work through equitable actions.[17] The act does so by granting, in relevant part, "each" subcontractor "who provides an improvement to real property" a "construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property."[18] Further, the act permits and defines the proceedings to enforce the lien, stating in MCL 570.1117:

> (1) Proceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded.
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> * * *
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> (4) Each person who, at the time of filing the action, has an interest in the real property involved in the action which would be divested or otherwise impaired by the foreclosure of the lien, shall be made a party to the action.
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> (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.
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> (6) Except as otherwise provided in subsection (1), a lien claimant who has been made a party to an action for foreclosure of a construction lien may

[11] See *id*. at 419-420 (enforcing the terms of the contract by which the parties had agreed to abide).

[12] See *Skutt v City of Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936).

[13] MCL 570.1101 *et seq.*

[14] See *Old Kent Bank of Kalamazoo v Whitaker Construction Co*, 222 Mich App 436, 438-441; 566 NW2d 1 (1997) (a construction contract claim is separate and distinct from a claim under the Construction Lien Act).

[15] MCL 570.1101 *et seq.*

[16] See MCL 570.1302(1).

[17] See MCL 570.1118(1).

[18] MCL 570.1107(1).

> enforce his or her own construction lien in the action by a cross-claim or counterclaim, and the owner or lessee may timely join other or potential lien claimants in the action.

MCL 570.1302(1) requires courts interpreting and applying the act to do so "liberally," in order "to secure the beneficial results, intents, and purposes of this act." To that end, MCL 570.1302(2) bars court from construing the act "to prevent a lien claimant from maintaining a separate action on a contract." Clearly, in light of this statutory scheme, National Precast's settlement with Citadel concerning its contract claim did not extinguish its claim under the Construction Lien Act.[19] Once National Precast became a party to this case pursuant to MCL 570.1117(4), it was entitled to file a timely cross-claim under the Construction Lien Act, which it did.[20] Thus, we conclude that the trial court erred when it summarily disposed of National Precast's lien claim on the basis of *Berkel*.[21]

IV. Interest

A. Overview

National Precast also argues that it is entitled to interest on its contract claim. It contends that the trial court's judgment on the parties' settlement constitutes a money judgment because it ordered "the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred."[22] Therefore, National Precast asserts, the prejudgment interest statute, MCL 600.6013, applies to this judgment. MCL 600.6013(5), the applicable subsection states:

> Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, *interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment* at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.[23]

B. Money Judgments

The written instrument at issue in this case is the construction contract with its pay-when-paid clause. Though National Precast was unsuccessful in having the pay-when-paid clause

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[19] See also *Old Kent Bank*, *supra*.

[20] See MCL 570.1117(6) and MCL 570.1118(1).

[21] Note that if National Precast prevails on its construction lien claim, MCL 570.1118(2) allows the trial court to award reasonable attorney fees.

[22] *In re Forfeiture of $176,598*, 465 Mich 382, 386; 633 NW2d 367 (2001).

[23] Emphasis added.

invalidated, it nevertheless recovered the amount it was due under the contract, hence the $54,500 settlement. The critical question that determines whether a judgment is a money judgment subject to this interest rate is whether the judgment "at issue calls for the payment of money, rather than the doing of an act, such as the return of a specific item of personal property."[24] We conclude that there is no merit to Citadel's argument that the order in this case falls outside the scope of a money judgment because it is analogous to an in rem or equitable order. Though, as Citadel notes, the Construction Lien Act is "equitable," it is also irrelevant to the money judgment interest statute in the Revised Judicature Act at issue in this appeal.

C. Orders Versus Judgments

We have also considered the fact that the trial court entered an "order" rather than a "judgment." MCR 2.116 makes the connection between summary disposition and judgment, indicating that a motion for summary disposition can result in judgment on a claim.[25] The order also fits the definition of a judgment as

> [t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding.[26]

Given the liberal construction of MCL 600.6013, there is no reason to decline to apply this statute merely because the trial court labeled its final disposition of this case an "order" rather than a "judgment." To deny National Precast interest in this case on the basis that the trial court did not enter a formal "judgment" would place Citadel, which has not cross-appealed or argued this issue, in a better position than it occupied at the conclusion of the trial court proceedings. Thus, in our view, National Precast is not at risk of losing the interest the trial court actually awarded in this case.

D. Calculation Of Interest

The final issue with respect to interest concerns its calculation. As we noted above, National Precast filed its cross- and counter-complaint against Eastbank and Citadel for foreclosure of the construction lien in early March 1993. At that time, National Precast also alleged breach of the construction contract and sought recovery under the Builders Trust Fund Act. However, the trial court awarded National Precast interest from the date Eastbank paid Citadel, April 24, 1995, until Citadel paid National Precast, March 28, 1996. The question is, therefore, whether Citadel owes interest to National Precast from March 1993 through April 1995.

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[24] *People v $176,598 US Currency*, 242 Mich App 342, 348; 618 NW2d 922 (2000).

[25] See, e.g., MCR 2.116(B)(1), G)(4).

[26] Black's Law Dictionary (6th ed, 1990), pp 841-842.

Under MCL 600.6013(5), the calculation of interest begins with "the date of filing the complaint." In this case, that date would be the date in March 1993 when National Precast filed its counter-complaint against Citadel.[27] We are, however, mindful of Citadel's argument that, under the pay-when-paid provisions of the construction contract, National Precast would have had no cause of action against Citadel on that date, because Eastbank had not then paid Citadel.

In *Phinney v Perlmutter*,[28] this Court considered a somewhat similar issue. There, Carolyn Phinney, a former researcher at the University of Michigan, filed her complaint against Marion Perlmutter on October 1, 1990.[29] However, the original complaint did not include a claim for "fraud and misrepresentation, the theory upon which Phinney ultimately recovered."[30] Indeed, only when Phinney filed her fourth amended complaint on March 11, 1992, did she claim fraud and misrepresentation.[31] Whether Phinney asked for interest calculated from the date she filed the first complaint is not clear. However, the trial court ruled that the prejudgment interest should be calculated[32] from the date Phinney filed the fourth amended complaint.[33]

Phinney then cross-appealed the trial court's decision regarding interest.[34] In analyzing the issue, this Court first noted that "the purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bring actions for money damages, and for any delay in receiving such damages."[35] However, this Court then cited Justice Riley's opinion in *Rittenhouse v Erhart*,[36] for the proposition that the purpose of prejudgment interest statute "is not furthered by allowing interest for periods during which *no claim existed* against the defendant."[37] This Court also acknowledged that "[a] court may disallow prejudgment interest for periods of delay where the delay was not the fault of, or caused by, the debtor," and suggested that Phinney caused some delay by waiting more than a year to amend her complaint to include this additional

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[27] See *Goodwin, Inc v Coe (On Remand)*, 62 Mich App 405; 233 NW2d 598 (1975).

[28] *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997).

[29] *Id*. at 520, 539.

[30] *Id*. at 540.

[31] *Id*.

[32] The trial court in *Phinney* relied on MCL 600.6013(6) and (8), not subsection (5), because the case did not involve judgment on a written instrument. See *Phinney*, *supra* at 540. Notably, however, subsection (8) also requires prejudgment interest to be calculated from "the filing of the complaint." Compare MCL 600.6013(5) and MCL 600.6013(8). Thus, there is no reason to distinguish *Phinney* from this case on the basis of the statutory subsection at issue.

[33] *Phinney*, *supra* at 540.

[34] *Id*. at 539-540.

[35] *Id.* at 541, citing *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 356; 554 NW2d 43 (1996) and *Paulitch v Detroit Edison Co*, 208 Mich App 6456, 663, n 2; 528 NW2d 200 (1995).

[36] *Rittenhouse v Erhart*, 424 Mich 166, 218; 380 NW2d 440 (1995).

[37] *Phinney*, *supra* at 542 (emphasis added).

theory of recovery.[38] Nevertheless, the Court returned to the statute's remedial purpose and liberal interpretation, holding that "prejudgment interest was awardable from the date that a complaint was filed against Perlmutter."[39] Thus, the Court reversed and remanded the interest issue to the trial court.[40]

In this case, given the contract's pay-when-paid provision, it is certainly arguable that National Precast suffered no compensable loss until Eastbank paid Citadel in April 1995. Nevertheless, National Precast's claim against Citadel did exist at the time it filed its counter-complaint in March 1993. That claim, even if premature, was never dismissed. While it would not seem to further the purpose of MCL 600.6013(5) to award prejudgment interest for a period when a claim was not yet compensable, *Phinney* makes clear that the language in the statute must be construed liberally in National Precast's favor. This is certainly a literal – perhaps even wooden – reading of the statute, but it does comport with the statute's plain and unambiguous meaning. There is nothing in our judicial charters, nor should there be, that gives us the power to amend the plain and unambiguous meaning of a statute, even if we encounter absurd results from the statutory language.[41] The Legislature, alone, has the power to amend statutes, and perhaps that body should consider exercising its power to amend this particular statutory provision. However, regardless of any future legislative action, the trial court in this case erred when it refused to award prejudment interest on the $54,000 judgment from the date National Precast filed its claim in its counter-complaint. Whether the pay-when-paid clause would have allowed Citadel to argue that National Precast's contract claim was not viable at the time it filed the counter-complaint because Citadel had yet to receive payment has no effect, we conclude, on the statutory language as it currently exists.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

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[38] *Id*. at 541.

[39] *Id*. at 541-542.

[40] *Id*. at 564.

[41] The Supreme Court has warned that the "absurd result" method of interpreting statutes plays no role when the statutory meaning is clear. See *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999).