

STATE OF MICHIGAN
COURT OF APPEALS

PRESTIGE PAVERS, INC.,

Plaintiff/Counter-Defendant,

v

ESTATE HOMES, L.L.C., PALAZZO HOLDING
GROUP, L.L.C., CITIZENS FIRST SAVINGS
BANK, CITIZENS FIRST MORTGAGE, L.L.C.,
and M & M ELECTRIC,

Defendants/Cross-Defendants,

and

RICHARD WEILER and CYNTHIA WEILER,

Defendants/Cross-Plaintiffs/Cross
Defendants-Appellees,

and

CONSUMERS LUMBER COMPANY,

Defendant/Counter-Plaintiff/Cross-
Plaintiff Appellant.

UNPUBLISHED

May 20, 2008

No. 276139

Macomb Circuit Court

LC No. 05-004413 CK

Before: White, P.J. and Hoekstra and Schuette, JJ.

WHITE, P.J. (*dissenting*).

I respectfully dissent. I do not agree that the affidavit submitted by the Weilers entitled them to summary disposition under the circumstances presented. While Consumers Lumber Company (CLC) might have offered more than legal argument in support of its opposition to the motion, the affidavit did not conclusively establish that the Weilers already paid Estate Homes for the materials provided by CLC. The affidavit simply establishes that Cummings represented that the \$43,000 would be used to payoff any other potential lien claimants. I cannot agree that this simple, general, oral representation insulates the Weilers from the lien as a matter of law. The statement might be understood to mean that the \$43,000 would be used in its entirety, and

was sufficient, to satisfy and discharge all debts to any lien claimants, but it also could be understood as a representation that the money would go towards that end, while it might not satisfy each individual lien. In any event, the Weilers were in a position to demand that Cummings provide sworn statements showing exactly who was paid, and in what amounts. Further, the record supports CLC's assertion at argument on the summary disposition motion that some of the materials were supplied by CLC after the Weilers made their last payment. The affidavit is insufficient to establish that the last payment was intended to be a prepayment for these materials.

I also observe that the circuit court referred to the affidavit's assertion that when the Weilers "made the previous \$60,000 to Estate Homes, L.L.C., on March 11, 2005, Estate Homes, L.L.C., had provided [the Weilers] a waiver of lien indicating that all labor and materials provided through March 10, 2005 were fully paid." However, a review of the waiver shows that only "labor" was underlined, not "material." Further, it is undisputed that the entire contract price had not been paid. While I agree that *Erb Lumber, Inc v Gidley*, 234 Mich App 387; 594 NW2d 81 (1999), makes clear that this does not foreclose the Weilers from asserting a defense under MCL 570.1203, it does mean that prior payment of the improvement cannot be established by simply showing that the contract price has been paid.

In *Erb Lumber*, relied on by the Weilers and the majority, the trial court found, after a trial, that the money paid to the contractor was, in fact, a prepayment of money needed to purchase materials from *Erb Lumber*. Here, the question is whether the affidavit, which can be taken at face value because it was not countered by an opposing factual affidavit, establishes prior payment as a matter of law. For the reasons stated above, I do not think it does.

I would reverse and remand for further proceedings.

/s/ Helene N. White