STATE OF MICHIGAN

COURT OF APPEALS

PROBUILD NORTH, L.L.C.,

Plaintiff-Appellee,

v

STEVEN R. ELLIS, a/k/a STEVE ELLIS, d/b/a SE BUILDER,

Defendant,

and

RONALD R. JINKS and KIMBERLY JINKS,

Defendants-Appellees,

and

DEPARTMENT OF LABOR & ECONOMIC GROWTH,

Defendant-Appellant.

UNPUBLISHED
February 4, 2010

No. 288439
Saginaw Circuit Court
LC No. 06-062509-CK

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant Department of Labor and Economic Growth (DLEG), through the Homeowner Construction Lien Recovery Fund (the Fund), appeals as of right from a judgment entered in favor of plaintiff and against the Fund for $24,543.49. On appeal, the Fund challenges the trial court's earlier order granting summary disposition to defendants Ronald and Kimberly Jinks. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The Jinkses accepted a proposal for home improvements made by defendant Steven Ellis. The contract price was $37,000, including labor and materials. The Jinkses ultimately paid Ellis $38,680. Ellis obtained lumber and other building materials from plaintiff on credit. Ellis failed to fully pay for the materials, so plaintiff filed a claim of lien in March 2006. The claim indicated that Ellis's total contract amount with plaintiff was $31,012.31, which, when adjusted

for payments and other credits of $15,654.75, left an unpaid balance of $15,357.56. In October 2006, plaintiff brought this action to foreclose the lien.

At issue in this appeal is whether the construction lien can be enforced against the Jinkses' property because they did not pay Ellis, the contractor, for the improvements to their property. Plaintiff and the Fund both argue that this determination must be made on the basis of the value of the improvements, not the contract price. We disagree and conclude that because the undisputed evidence showed that the Jinkses fully paid Ellis for the amount of the contract price, the trial court properly granted their motion for summary disposition.

Before MCL 570.1203 was amended by 2006 PA 572, effective January 3, 2007, the statute provided, in pertinent part:

> (1) A claim of construction lien shall not attach to a residential structure, to the extent payments have been made, if the owner or lessee files an affidavit with the court indicating that the owner or lessee has done all of the following:
>
> (a) Paid the contractor for the improvement to the residential structure and the amount of the payment.
>
> (b) Not colluded with any person to obtain a payment from the fund.
>
> (c) Cooperated and will continue to cooperate with the department in the defense of the fund.

In an effort to satisfy the requirements of this statute, the Jinkses submitted an affidavit from defendant Ronald Jinks, who averred that he paid $38,680 to the contractor for the improvements to their residential structure, that he did not collude with any other person to obtain payment from the Fund, and that he had cooperated and would continue to cooperate with the DLEG in the defense of the Fund.

The trial court determined that there was no genuine issue of material fact that the Jinkses had "[p]aid the contractor for the improvement to the residential structure . . . ." On appeal, the Fund contends that the evidence showed that the contractor underbid the project, and, accordingly, there was a genuine issue of material fact regarding whether the Jinkses paid the contractor for the improvement.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Neither plaintiff nor the Fund cite case law supporting their position that payment for the improvement referenced in former MCL 570.1203 contemplates payment of the *value* of the improvement or the market price for the improvement. In fact, pertinent statutory and case law indicates that payment for the improvement is measured by the contract price.

Former MCL 570.1107(6) indicates that the total amount of liens cannot exceed the contract price less payments made:

> If the real property of an owner or lessee is subject to construction liens, the sum of the construction liens shall not exceed the amount which the owner or lessee agreed to pay the person with whom he or she contracted for the improvement as modified by any and all additions, deletions, and any other amendments, less payments made by or on behalf of the owner or lessee, pursuant to either a contractor's sworn statement or a waiver of lien, in accordance with this act.

Pursuant to this provision, if the owner has fully paid the amount that he "agreed to pay," then the sum of the construction liens shall not exceed zero. As recognized in *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 128; 560 NW2d 43 (1997), "[t]his subsection was designed to protect an owner from excessive liens by allowing an owner to rely on the price set forth in its contract with the general contractor." Thus, the Construction Lien Act provides protection for owners who pay the contract price. The provision is incompatible with an interpretation of MCL 570.1203 that would preclude a lien only if the owner paid for the value of the improvement.

Vugterveen Systems and *Erb Lumber v Gidley*, 234 Mich App 387; 594 NW2d 81 (1999), both support the conclusion that full payment of the contract price to the contractor precludes a construction lien. In *Vugterveen Systems*, 454 Mich at 129, the owner fired the general contractor (Vander Wall) and the subcontractor (Vugterveen) and paid additional amounts on a second general contract. The Court rejected the owner's contention that the calculation of the payments made for purposes of MCL 570.1106(6) should include payments under the second general contract. *Vugterveen Systems*, 454 Mich at 129. However, the Court explained that the owner "will have a defense to Vugterveen's lien if it can show that the sum of payments made pursuant to sworn statements and waivers of lien under the Vander Wall contract plus Vugterveen's claim of lien exceed the price of the Vander Wall contract." *Vugterveen Systems*, 454 Mich at 129.

In *Erb Lumber*, 234 Mich App at 390-391, the owners paid most of the contract price, but withheld part of the payment because they believed the work was incomplete and then learned that the contractor intended to declare bankruptcy. Erb Lumber sought to foreclose a lien against the property for the unpaid balance that the contractor owed. *Id*. at 391. Although the owners had not paid the full contract price, the trial court gave them a credit for the unpaid amount because of poor workmanship and unfinished tasks. *Id*. The trial court determined that the amount paid by the owners fully compensated the contractor for the improvement the owners received. *Id*. The court then concluded that Erb Lumber was precluded from foreclosing on the lien because the owners had fully paid the contractor for the improvement. *Id*. at 392. This Court affirmed that decision, but analyzed the matter differently. Instead of agreeing with the trial court's discount-to-contract price on the basis of the value of the work that the contractor had performed, the Court concluded that owners seeking to preclude a lien from a supplier need not show that they fully paid for the entire construction job. *Id*. at 396. Rather, as a defense to a lien by a supplier, the owner's payment to the contractor for the "improvement" provided by the supplier is sufficient. *Id*. A supplier's improvement "is limited to the materials supplied." *Id*. The issue then was whether the owners' (incomplete) payment to the contractor should be

deemed to be for the construction materials provided by Erb Lumber. *Id*. at 396-400. However, in addressing a dissenting opinion in that case, the majority noted, "We agree that the homeowners here should be allowed to rely on their overall contract price so that they would not be forced to pay more for liens than the price stated in the general contract . . . ." *Id*. at 397.

The analysis of this case does not involve the complications of payments to more than one contractor, as in *Vugterveen Systems*, or partial payment to the contractor, as in *Erb Lumber*. Thus, there is no need to determine how payments to the contractor should be allocated. The Jinkses paid the contractor the full contract price, which included materials. Regardless of whether the contract price was too low, the Jinkses "[p]aid the contractor for the improvement." MCL 570.1203(1)(a). Therefore, the trial court correctly determined that the Jinkses were entitled to summary disposition.

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray