

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICH OSTERMAN ELECTRIC COMPANY,  
INC.,

Plaintiff,

v

MAHMOOD AHMED and SAEEDA AHMED,

Defendants/Cross-Defendants-  
Appellants,

and

NATIONAL CITY MORTGAGE a Division of  
NATIONAL CITY BANK OF INDIANA,

Defendant/Cross-Defendant,

and

MICHGAN LUMBER COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

MCL WINDOW COMPANY,

Defendant/Cross-Plaintiff,

and

LANDMARK CONSTRUCTION &  
DEVELOPMENT CORPORATION,

Defendant/Cross-Defendant.

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UNPUBLISHED  
May 27, 2010

No. 290240  
Oakland Circuit Court  
LC No. 2007-082672-CK

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM

Mahmood and Saeeda Ahmed appeal the trial court's order that granted foreclosure judgment to Michigan Lumber Company.<sup>1</sup> For the reasons set forth below, we affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

The trial court ruled in this case on the basis of documentary evidence the parties submitted by stipulation. The court's judgment includes a recitation of factual findings, which, but for the question of appellants' defense to appellee's construction lien, are not in dispute:

A. Defendants Mahmood and Saeeda Ahmed (jointly, "Ahmeds") are the property owners of certain real property and improvements located at 6691 Glenway Drive, West Bloomfield . . . (the "Property").

B. Defendant National City Mortgage ("National City") made loans to Defendants Mahmood Ahmed and Saeeda Ahmed (jointly, "Ahmed"), and the total principal amount due to National City upon such loans amounted to \$536,000.00 . . . .

C. Defendant Michigan Lumber Company ("Michigan Lumber") provided certain materials to the Property and duly recorded its construction lien against the Property pursuant to the Michigan Construction Lien Act. The construction lien of Michigan Lumber is in the amount of \$89,418.48, with interest accrued thereon through October 16, 2008 of \$6,656.91 for a total sum due to Michigan Lumber for such construction lien in the amount of \$96,075.39.

D. National City has a first priority mortgage lien in the amount of \$133,312.92, plus accrued interest from September 17, 2008 through the date of payment, with the remainder of the amount due National City under the loan documents being subordinate to the amount due Michigan Lumber upon its construction lien, being \$96,075.39, plus accrued interest.

\* \* \*

F. For the reasons stated on the record, there is no valid defense by the Ahmeds to the construction lien of Michigan Lumber. The Ahmeds presented no defense or objection to the amounts claimed by, or the loan documents of, National City, which the Ahmeds acknowledged are valid, binding and in full force and effect.

G. The Property is capable of being sold at public sale to the highest bidder pursuant to MCL 600.3101, et seq., the Michigan Construction Lien Act, and the

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<sup>1</sup> This case gave rise to several other claims that have been resolved and are not at issue on appeal.

Michigan Court Rules of 1985 . . . in payment of the amount due Michigan [L]umber and to thereby extinguish its claim and interest in the Property and that, to the extent any proceeds remain, to be remitted to the Court for distribution.

\* \* \*

I. The Ahmeds have failed to pay the amount due Michigan [L]umber and, as a result of their inability to satisfy the construction lien, the existence of the construction lien against the Property constitutes a default upon the mortgages of National City.

J. [N]o impediment exists to this Court's ordering the immediate foreclosure sale of the Property. . . .

The parties agree that the general contractor for the project, Landmark Construction, absconded with all monies the Ahmeds paid for the project. The Ahmeds insist that they paid Landmark certain funds intended to cover the acquisition of lumber from a nonparty, Sulja Brothers, Lowes, and that having done so they have no obligation to satisfy Michigan Lumber's demand for payment for lumber that Landmark contracted with Michigan Lumber to supply.

We review a trial court's factual findings for clear error and its application of law de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). Governing this issue is the Construction Lien Act, MCL 570.1101 *et seq.* The parties do not dispute that Michigan Lumber satisfied the requirements for establishing its lien against the property. Michigan Lumber provided the Ahmeds with a notice of furnishing, thus implicating § 110(8) of the act: "An owner, lessee, designee, mortgagee, or contractor may rely on a sworn statement prepared by a party other than himself or herself to avoid the claim of a subcontractor, supplier, or laborer unless the subcontractor, supplier, or laborer has provided a notice of furnishing . . . ." A notice of furnishing "notifies owners of the identity of subcontractors improving the property who may become future lien claimants." *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 122; 560 NW2d 43 (1997).

At issue is whether the trial court erred when it ruled that the Ahmeds failed to present a valid defense to Michigan Lumber's demands for payment for lumber furnished which would prevent Michigan Lumber from foreclosing on the lien.

Section 203(1) of the Construction Lien Act provides as follows:

A claim of construction lien does 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 according to the contract, indicating in the affidavit the amount of the payment. The owner or lessee shall attach to the affidavit copies of the contract, any change orders, and any evidence of the payment that the owner or lessee has, including, but not limited to, a canceled check or a credit card or other receipt.

(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.

The legislative purposes behind this provision include protecting homeowners from paying twice for improvements if the contractor accepted payment from the homeowner but never paid the pertinent subcontractor. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 394; 549 NW2d 81 (1999). Owners who, as in this case, have not paid the full contract price, but who pay in advance for the materials provided by a lien claimant with an advance paid to the contractor, thereby have a defense to the lien under § 203. See *Erb Lumber*, 234 Mich App at 397-399.

However, because Michigan Lumber provided a notice of furnishing and otherwise protected its rights under the Construction Lien Act, the Ahmeds were also required to comply with the act to defend against Michigan Lumber's claims.

The Ahmeds assert that they relied on a sworn statement from Landmark Construction that Sulja Brothers, Lowes, would provide the lumber for a certain price, but Michigan Lumber's notice of furnishing negates any reliance on such representations from Landmark. MCL 570.1110(8).

In an attempt to invoke the protections of MCL 570.1203(1), the Ahmeds cite their affidavit of payment from September 2008. That affidavit states that Mahmood Ahmed paid Landmark "for improvements to residential structure . . . in the amount of \$117,000.00, for specific lumber materials which Michigan Lumber Company now alleges is unpaid." Attached are copies of the construction contract, the contractor's estimates of attendant expenses, and documents reporting various disbursements by the Ahmeds to Landmark. But the Ahmeds point to no part of any of those documents that indicates a discrete payment specifically for lumber, or that specifies any supplier thereof.

Michigan Lumber's notice of furnishing established an obligation by the Ahmeds' that they could not avoid except through similarly specific documentation of having paid their general contractor specific amounts covering the substance of Michigan Lumber's claim. The general payments the Ahmeds did document, even if prompted in part by Landmark's asserted need for advances for materials, did not meet this standard.

For these reasons, the Ahmeds have failed to show that they paid the general contractor, Landmark, specifically for the lumber at issue. See *Erb Lumber*, 234 Mich App at 397-399; MCL 570.1203(1)(a). Accordingly, the trial court did not err when it ruled that the Ahmeds failed to offer a valid defense to Michigan Lumber's claim.

Affirmed.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto