STATE OF MICHIGAN

COURT OF APPEALS

BEN'S SUPERCENTER, INC. d/b/a BEN'S DO-IT BEST LUMBER & BUILDING SUPPLY, Plaintiff-Appellee, v ALL ABOUT CONTRACTING & EXCAVATING, LLC, HARVEY F. HOOD, III, JP MORGAN CHASE BANK MA f/k/a WASHINGTON MUTUAL BANK FA, and FIFTH THIRD BANK, Defendants, and EARL CRANK and ROBERTA A. CRANK, Defendants-Appellants.	UNPUBLISHED July 31, 2012 No. 302267 St. Clair Circuit Court LC No. 09-002608-CH

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Defendants, Earl and Roberta Crank (the homeowners), appeal by right from the circuit court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) and granting summary disposition to plaintiff, Ben's Supercenter, Inc, d/b/a Ben's Do-It Best Lumber & Building Supply (the supplier). We reverse and remand.

I. FACTS

In April 2009, the homeowners entered into a contract with defendant, All About Contracting and Excavating, LLC (the contractor), for the construction of a pole barn on their property.[1] The contractor provided a written quote of $13,900 for the job, and the homeowners

[1] The contractor and its owner, Harvey Hood III, were also named as defendants in this case at the lower court level. But the supplier received a default judgment against them. Therefore, the

testified that they verbally agreed to pay an additional $850 to upgrade the tresses and doors. During the period that the pole barn was in construction, the homeowners paid the contractor a total of $14,750. Unfortunately, the contractor abandoned the job before completion.

Before the contractor abandoned the construction, the supplier had provided building materials to the contractor to use in construction of the homeowners' pole barn. In June 2009, the supplier served a notice of furnishing by certified mail on the homeowners. The supplier alleged that it provided $11,894.42 worth of materials for the homeowners' pole barn, but received only $1,786.60 from the contractor in return. The supplier filed a claim of lien for $10,107.82 with the St. Clair County Register of Deeds, and served it on the homeowners, as owners, and the contractor, as general contractor. The supplier also filed a notice of lis pendens with the register of deeds.

After filing its claim of lien, the supplier then filed suit against the homeowners and the contractor. Shortly thereafter, the supplier filed an amended complaint. The amended complaint contained seven counts, but for the purposes of the instant case, only Count I and Count VII are relevant. Count I requested foreclosure of the lien on the homeowners' property for $10,107.82, while Count VII sought $10,107.82 from the homeowners for unjust enrichment.

The homeowners moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). In support of their motion with regard to Count I, the homeowners noted that the Construction Lien Act (CLA), MCL 570.1101 *et seq*., prohibited the attachment of a construction lien to a residential structure. With regard to Count VII, the homeowners argued that an implied contract could not exist in the presence of an explicit contract and that both the homeowners and the supplier had express contracts with the contractor. The homeowners also argued that because they had paid over $14,000 for the construction of the pole barn, a finding of unjust enrichment would require the homeowners to pay twice for the materials that the supplier provided.

In response, the supplier asserted that the pole barn in question did not qualify as a residential structure. Additionally, it argued that there was no express contract between the homeowners and the contractor, as the homeowners had only produced the original price quote from the contractor, which only the contractor, but not the homeowners, had signed.

Following oral arguments, the trial court issued a written opinion and order denying the homeowners' motion for summary disposition and granting summary disposition to the supplier on Count I and Count VII. The trial court found that the pole barn was not a residential structure because it was not attached to the homeowners' home and because the homeowners had testified that they would not sleep there. The trial court also found that there was no express contract between the homeowners and the contractor, that the homeowners accepted the building materials that the supplier provided while knowing that the supplier was not acting as a volunteer, and that the value of the homeowners' property was enhanced as a result of the

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contractor is not involved in this case on appeal. The banks holding the homeowners' mortgage were also named as defendants. However, these parties are also not involved in this appeal.

materials that the supplier provided. The trial court found this sufficient to support a finding of unjust enrichment.

The homeowners now appeal.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo both a lower court's decision to grant or deny summary disposition and questions of statutory interpretation. *Wexford Med Group v Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 507; 667 NW2d 505 (2003).

B. COUNT I

The homeowners argue that the trial court erred by denying their motion for summary disposition with regard to Count I of the supplier's complaint.

The resolution of this issue requires the interpretation of various sections of the CLA. The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Booker v Shannon*, 285 Mich App 573, 575; 776 NW2d 411 (2009). If the language of the statute is unambiguous, judicial construction is not permitted because the Legislature is presumed to have intended the meaning it plainly expressed. *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; 773 NW2d 243 (2009). Where ambiguity exists, we must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 644; 513 NW2d 799 (1994). In construing a statute, the statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole. *Id.* And courts must avoid a construction that would render statutory language surplusage. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

MCL 570.1203[2] sets forth the requirements that must be met in order for a homeowner to avoid paying a lienholder for amounts already paid to the contractor. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 393; 594 NW2d 81 (1999). Specifically, MCL 570.1203 provides, in pertinent part, as follows:

[2] MCL 570.1203 has since been repealed and replaced by the substantially similar MCL 570.1118a(1) and (2). 2010 PA 147. The repealed sections govern this case, however, because the events in this case took place before repeal. See *Church & Church, Inc v A-1 Carpentry*, 483 Mich 885, 886; 759 NW2d 877 (2009).

> (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.
>
> (2) In the absence of a written contract pursuant to section 114, the filing of an affidavit under this section shall create a rebuttable presumption that the owner or lessee has paid the contractor for the improvement. The presumption may be overcome only by a showing of clear and convincing evidence to the contrary.

This Court's determination regarding whether MCL 570.1203 barred attachment of the supplier's lien in this case requires a resolution of three questions:

1. Did the lien involve a residential structure?

2. Was the homeowners' affidavit in compliance with MCL 570.1203(1)(a) – (c)?

3. In the absence of a written contract, did the supplier submit sufficient evidence to overcome the rebuttable presumption that the homeowners paid the contractor for the improvement?

1. ATTACHMENT TO RESIDENTIAL STRUCTURE

MCL 570.1203(1) prevents the attachment of construction liens on residential structures. The CLA defines the phrase "residential structure" as follows:

> "Residential structure" means an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, and all appurtenances, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement. [MCL 570.1106(3).]

On the basis of the plain language of the statute, the homeowners' house—a residential building containing not more than 2 residential units—and the land on which that house sits, clearly fall within the definition of "residential structure." And, in claiming a lien on the real property (identified by street address and legal description on the Claim of Lien), the supplier sought to attach the lien to the homeowners' property as a whole—that is, not only to the pole barn for which the supplier provided materials, but also to the homeowners' house and the land on which their house is built. Thus, because the supplier seeks to attach the lien to the

homeowners' house and land as "residential structures," it must necessarily fail if the homeowners establish the rest of the statutory requirements.

The trial court's requirement that the pole barn *itself* qualify as a residential structure has no support in the law. MCL 570.1203 does not require that the project giving rise to the lien be a residential structure. All that is required is that the project giving rise to the lien be an improvement to a residential structure. See MCL 570.1203(1)(a) (requiring that the affidavit state that the owner "[p]aid the contractor for the improvement to the residential structure . . ."). As this Court has explained, "Section 203 was meant to provide for the payment of subcontractors and suppliers, but also protect homeowners from paying twice for improvements to their property where the contractor took the payment from the homeowners but did not pay the subcontractor or supplier." *Erb Lumber*, 234 Mich App at 394. Here, there can be no question that the construction of the pole barn, as a result of labor or material provided by the contractor and the supplier, was an improvement to the residential structure. See MCL 570.1104(5) (defining "improvement" as "the result of labor or material provided by a contractor, . . . [or] supplier, including, . . . constructing . . . , pursuant to a contract").

Additionally, that the project, or improvement, giving rise to the lien need not itself be a residential structure in order to avoid the attachment of the lien is exemplified in *DLF Trucking, Inc v Bach*, 268 Mich App 306; 707 NW2d 606 (2005). In *DLF Trucking*, this Court held that a construction lien did not attach to a homeowner's property to the extent that the homeowner paid for the improvement to his property, which in that case involved installation of a septic field and other excavating work. *Id.* at 308, 309. Notably, under the trial court's interpretation of the CLA here—requiring that the improvement itself be a residential structure—the lien in *DLF Trucking* would have had to attach to the property unless the owner resided or intended to reside in the septic field. Such an absurd interpretation cannot be sustained.

Having determined that the lien does involve a residential structure, we turn to consideration of whether the rest of the statutory requirements have been met.

2. SUFFICIENCY OF AFFIDAVITS

In order to succeed in defeating the attachment of a construction lien using MCL 570.1203(1), a homeowner must submit an affidavit to the court indicating that the owner 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.

Here, the homeowners submitted a pair of affidavits. The first, filed with their answer to the supplier's complaint, swore that they hired the contractor to build the pole barn, that they did not collude with any person to obtain payment from the fund, and that they cooperated and will continue to cooperate with the department in the defense of the fund. In the second affidavit,

filed with the homeowners' motion to dismiss, the homeowners swore that they paid the contractor $14,750. The amount of the payment was further established through the inclusion of a number of cancelled checks to the contractor totaling $12,750, as well as a signed job quote from the contractor acknowledging the receipt of an additional $2,000.

The trial court found that these affidavits failed to establish the contract price in writing. However, nowhere in MCL 570.1203(1) does the word "contract" appear. The words "written contract" *do* appear in MCL 570.1203(*2*), but only to provide that a proper affidavit establishes the rebuttable presumption of payment in the *absence of a written contract*. The plain language of the statute does not support the trial court's interpretation that the homeowners establish any sort of contract, written or otherwise. The statute only requires that payment be made. (And, regardless, we conclude there is ample evidence from the conduct of the homeowners and the contractor to infer the existence of a contract between those parties.)

The trial court's opinion also implies an additional requirement that the homeowners show that they made payment in full to the contractor. Again, there is no such requirement in the statute. The statute only requires an affidavit stating that the contractor was paid and how much he was paid. If such an affidavit is filed, then a lien on a homeowner's property does not attach to the extent that payment was made. A requirement of payment *in full* does not appear anywhere in MCL 570.1203(1).

We conclude that the affidavits, viewed together, fulfill all the requirements in MCL 570.1203(1), and as such, the homeowners created a presumption that payment was made to the contractor. That presumption can only be rebutted by clear and convincing evidence under MCL 570.1203(2). Thus, to the extent that the trial court found the homeowners' affidavits to be insufficient, the trial court was in error.

3. OVERCOMING THE REBUTTABLE PRESUMPTION

Pursuant to MCL 570.1203(2), in the absence of a written contract, the filing of an affidavit in accordance with MCL 570.1203(1) creates "a rebuttable presumption that the owner . . . has paid the contractor for the improvement." "The presumption may be overcome only by a showing of clear and convincing evidence to the contrary." MCL 570.1203(2).

Here, the supplier offered no evidence to rebut the presumption that the homeowners paid the contractor for the construction of their pole barn. Therefore, because the supplier did not rebut the presumption that the homeowners paid the contractor $14,750 for the construction of their pole barn, we conclude that the homeowners are presumed to have paid that amount as a matter of law.

In sum, we conclude that the trial court erred by denying the homeowners' motion for summary disposition and by awarding summary disposition to the supplier on Count I of the supplier's complaint.

C. COUNT VII

The homeowners argue that the trial court erred by denying their motion for summary disposition with regard to the supplier's claim of unjust enrichment.

The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the defendant's retention of the benefit. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). In such instances, the law operates to imply a contract in order to prevent unjust enrichment. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, a contract will be implied only if there is no express contract covering the same subject matter. *Id*.

While the traditional elements of unjust enrichment merely require inequity resulting to the plaintiff because of the defendant's retention of the benefit, in practice, the Michigan Supreme Court has handled third-party unjust enrichment cases somewhat differently. In *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 180-181; 504 NW2d 635 (1993), as in this case, a supplier sued a third-party beneficiary after the general contractor failed to pay the supplier for the materials. In *Kammer*, however, the supplier had expressed concerns about receiving payment for the building materials to the third party, who then provided assurances to the supplier that full payment would be made. *Id.* at 186-187. In its opinion, the Supreme Court held as follows:

> Although [the supplier] indirectly provided [the third-party] a benefit, its contract was with [the general contractor], and the benefit it provided was in exchange for compensation. The risk of nonpayment could be understood to rest with [the supplier]. Moreover, [the third party] paid the general contractor $1.3 million for the work performed. [The supplier], however, was permitted to assume the submitted bonds were valid once it received copies of the bonds, and [the third party] repeatedly assured [the supplier] of payment because of the bonds. Hence, equity demands [the supplier] be permitted to go forward with this count for those damages that arose after certification of the bonds and verbal assurances of protection by the bonds were given by [the third party]. [*Id*. at 187-188.]

In this case, like *Kammer*, the homeowners here received a benefit and paid the general contractor for that benefit. Also, as in *Kammer*, the supplier had a contract with the general contractor, and the general contractor failed to pay the supplier for the materials provided under the contract. However, unlike *Kammer*, the homeowners did nothing to contribute to the supplier's losses. The homeowners did not assure the supplier that its interests would be protected. As such, the homeowners are not liable to the supplier under a theory of unjust enrichment. Therefore, we conclude that the trial court erred by denying the homeowners' motion for summary disposition and by awarding summary disposition to the supplier on Count VII of the supplier's complaint.

We reverse and remand for entry of an order granting the homeowners summary disposition on Counts I and VII of the supplier's complaint. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering