STATE OF MICHIGAN

COURT OF APPEALS

WICKES LUMBER COMPANY,

Plaintiff-Appellant,

v

CHRISTOPHER ROMPS, individually and d/b/a C.G. ROMPS BUILDERS, JOHN J. BIAFORE SR., GLORIA L. BIAFORE, TECHNICAL SYSTEMS SERVICES, INC, and HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND,

Defendants-Appellees.

UNPUBLISHED
July 10, 1998

Nos. 198984, 200174
Roscommon Circuit Court
LC No. 96-007320 CH

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right the trial court's order granting summary disposition to defendants in No. 198984, and by leave granted the order awarding $4,607.50 in attorney fees and costs to the Biafores in No. 200174. We affirm the order in No. 198984, but reverse in No. 200174.

No. 198984

The trial court did not err in granting summary disposition to the Biafores and Technical Systems, Inc. by ordering the dismissal of plaintiff's lien against the Biafores' property, as well as the dismissal of plaintiff's complaint against the Biafores and Homeowner Construction Lien Recovery Fund ("the Fund"), upon the Biafores' deposit of $9,000 with the trial court and the disbursement of $5,630.24 to plaintiff as payment in full for the materials and supplies furnished to Romps in completing the Biafores' home improvement project. Although the trial court did not indicate the subrule under which summary disposition was granted, summary disposition was proper under MCR 2.116(C)(7) because the trial court considered matters outside the pleadings in determining that defendants were entitled to a judgment as a matter of law. In reviewing a motion for summary disposition because the claim is barred under MCR 2.116(C)(7), the plaintiff's well-pleaded allegations are accepted as true,

and the appellate court examines the pleadings, affidavits, depositions, admissions and documentary evidence submitted in the light most favorable to the nonmoving party. If the pleadings show that a party is entitled to judgment as a matter of law, or if the proofs show that there is no genuine issue of material fact, then the trial court must enter judgment without delay. MCR 2.116(I)(1); *Stamps v City of Taylor*, 218 Mich App 626, 630; 554 NW2d 603 (1996)

The instant case is governed by the building contract fund or Michigan builders' trust fund act [MBTF], MCL 570.151 *et seq*.; MSA 26.331 *et seq*. *People v Whipple*, 202 Mich App 428, 432; 509 NW2d 837 (1993)(and cases cited within). Section one provides:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

As noted in *Weathervane v White Lake*, 192 Mich App 316, 325-326; 480 NW2d 337 (1991), citing *People v Miller*, 78 Mich App 336, 345; 259 NW2d 877 (1977):

> The contractor holds the money paid for the construction project as a trustee. . . . The primary duty of the trustee is to ensure that trust funds are spent on the particular project for which the trust funds were deposited. As trustee, the contractor owes a fiduciary duty to the beneficiaries to exercise proper and honest judgment, considering the nature and object of the trust.

In the instant case, the basic facts are essentially undisputed. The Biafores entered into a contract with defendant C.G. Romps Builders for the construction of an addition to their home. The contract price was $29,000. The sum of $10,000 was to be paid as a down payment, with $10,000 being paid when the project was 50% completed, and the final $9,000 being paid when the project was completed and accepted. Romps used plaintiff as a supplier of lumber and other building materials for the project. Although the Biafores made payments of $10,000 to Romps on August 1, 1995, and September 25, 1995, Romps did not complete the work, and consequently the Biafores did not make the final payment. After the Biafores made the September 25, 1995 payment, Romps wrote plaintiff a check, dated October 10, 1995, in the amount of $9,645.11, which was applied by plaintiff to Romps' general account, and not specifically to the bill for materials for the Biafore project. By letter dated December 16, 1995, however, Romps informed plaintiff that the payment should have been credited to the bill for materials for the Biafore project. In addition, by letters dated December 26, 1995, and January 3, 1996, counsel for the Biafores informed counsel for plaintiff that the funds paid to Romps were trust funds pursuant to MCL 750.151; MSA 26.331. The Biafores offered to pay the outstanding portion of the materials bill in exchange for an unconditional waiver of lien. Nevertheless, on January 5, 1996, plaintiff filed a lien in the amount of $15,275.35 against the Biafore residence.

Here, the record indicates that Romps, the general contractor, took payment from the Biafores and paid plaintiff, the subcontractor, with a check in the amount of $9,645.11. Although plaintiff was

informed first by Romps and then by the Biafores' counsel to apply the check from Romps in the amount of $9,645.11 to the Biafores' account, plaintiff elected to apply the funds against Romps general account (which included debts from older projects), rather than credit the Biafores' account. Contrary to plaintiff's contention, it was not entitled to retain the funds as payment against Romps' general account once it was informed that the payment of $9,645.11 was to be applied against the Biafores' account. See *Blair v Trafco Products, Inc*, 142 Mich App 349, 353-355; 369 NW2d 900 (1985); *In re Johnson*, 691 F2d 249, 252-253 (CA 6, 1982).

Further, we agree with the Biafores that plaintiff's initiation of a lien action against them in the amount of $15,275.35 violated the Construction Lien Act, MCL 570.1101(6); MSA 26.316(101) (6), *Vugterveen Systems v Olde Millpond*, 454 Mich 119, 121-123; 560 NW2d 43 (1997). As the Biafores correctly point out, it was improper for plaintiff to foreclose its construction lien against their property in the amount of $15,275.35 when they presented plaintiff with an affidavit preventing attachment of a lien on residential structure pursuant to MCL 570.316.1203(1); MSA 316.1203(1). Thus, the trial court properly dismissed plaintiff's lien against the Biafores' property upon their deposit of $9,000 with the court.

The trial court also properly dismissed plaintiff's complaint with respect to the Fund upon the Biafores' deposit of $9,000 with the trial court. Here, plaintiff was not entitled to a payment from the fund because it did not comply with MCL 570.1203(3)(c); MSA 26.316(203)(3)(c), which provides in pertinent part:

> Subject to section 204, a person who has recorded a claim of lien and who is precluded from recovering a construction lien under subsection (1) may recover from the fund the amount for which the lien is established. A person who seeks recovery from the fund shall establish all of the following:
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> * * *
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> (c) That the contractor or subcontractor has retained or used the proceeds or any part of the proceeds paid to the contractor or subcontractor without having paid the person claiming the construction lien.

In this case, there was no showing by plaintiff that Romps retained or used all the proceeds and had not paid plaintiff. Indeed, Romps' letter dated December 16, 1995 clearly shows that the check in the amount of $9,645.11 was to pay for materials furnished by plaintiff for the Biafore project.

Contrary to plaintiff's position, the holder in due course doctrine, MCL 440.3302(1); MSA 19.3302(1), is irrelevant to the instant case. However, even if the holder in due course doctrine were relevant, we agree with the Biafores that plaintiff did not take the check from Romps free and clear of the encumbrances created by the MBTF because plaintiff, as the presumed holder in due course, had notice that the instrument was subject to a claim. See MCL 440.3305(1)(a)(2); MSA 19.3305. Moreover, the cases relied upon by plaintiff to support its position are factually and legally distinguishable. *People for Use and Benefit of Michigan Electric Supply Co v Vandenburg*

Electric Co, 343 Mich 87; 72 NW2d 216 (1955) is distinguishable because it involved a public project in which there is no right to assert a lien, whereas the instant case falls under the Construction Lien Act because the property in question is private and subject to a claim of lien. *Chris Nelson & Son v Shubow*, 374 Mich 403; 132 NW2d 122 (1965) is inapposite because it did not involve the Construction Lien Act, but rather whether the defendants, who were officers of several corporations in question, were personally liable when they signed a series of promissory notes as individuals and not as officers of the corporations.

Finally, there is no merit to plaintiff's contention that the trial court engaged in improper fact-finding because the trial court properly determined that defendants were entitled to a judgment as a matter of law.

No. 200174

Notwithstanding, we conclude that the trial court abused its discretion in awarding attorney fees and costs to the Biafores under MCR 2.114, MCR 2.625 or MCL 570.1118(2); MSA 26.316(118)(2). *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997). Although the trial court characterized plaintiff's tactics as "hardball," it did not make any findings indicating that plaintiff's action was frivolous or vexatious. Given that the trial court granted plaintiff partial recovery, we conclude that the Biafores were not entitled to costs and fees in this case because there was no showing that plaintiff's action was frivolous or vexatious.

We affirm No. 198984, but reverse No. 200174.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski