

STATE OF MICHIGAN
COURT OF APPEALS

PORTELLI & PAPONE PAINTING,

Plaintiff-Appellee,

v

JOSEPH M. ADAMY & ASSOCIATES, INC.,

Defendant-Appellant.

UNPUBLISHED

October 2, 1998

No. 202420

Oakland Circuit Court

LC No. 96-532148 CK

Before: Wahls, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from entry of a default judgment against it and from an order denying its motion for summary disposition. We affirm.

Defendant is a general contractor. Plaintiff is a subcontractor who agreed to do painting and related work on projects for defendant. After plaintiff completed work on each of three projects, plaintiff signed a “Full Unconditional Waiver” pursuant to MCL 570.1115; MSA 26.316(115), a section of the Construction Lien Act, MCL 570.1101 *et seq.*; MSA 26.316(101) *et seq.* The waiver stated, in pertinent part, “having been fully paid and satisfied, all my/our construction lien rights against such property are hereby waived and released.” However, according to plaintiff, defendant paid only a portion of the contract price on each project. After defendant refused to pay the remaining amount owed, plaintiff filed a complaint alleging breach of contract and violation of the Michigan Builders’ Trust Fund Act, MCL 570.151 *et seq.*; MSA 26.331 *et seq.*

Defendant did not respond to plaintiff’s initial discovery requests. Instead, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there could be no genuine issue of fact because plaintiff had signed a full unconditional waiver as to each project. Plaintiff responded that summary disposition would be premature as discovery was ongoing. Plaintiff also filed a motion to compel discovery. Thereafter, the parties entered into a consent order compelling defendant to respond to plaintiff’s discovery requests within 28 days. Thirty-two days later, defendant filed responses consisting largely of objections to plaintiff’s requests. Plaintiff then filed a second motion to

compel discovery, asserting that defendant's answers to its discovery requests were evasive and incomplete.

After hearing oral argument on the parties' motions, the trial court denied defendant's motion for summary disposition without prejudice, and granted plaintiff's motion to compel discovery. The discovery order provided:

Defendant shall answer all discovery requests and produce all requested documents on or before 3/14/97. Failure to so answer will result in a default judgment to be entered.

On March 18, 1997, having received no answers to its discovery requests, plaintiff filed an attorney affidavit of non-compliance with the discovery order. The trial court entered a default judgment against defendant the same day.

Defendant first argues that the trial court's denial of its motion for summary disposition was erroneous because once plaintiff signed the full unconditional waiver of lien, there could be no issue of material fact regarding payment. We review the trial court's ruling on a motion for summary disposition de novo. *Trierweiler v Frankenmuth Mut Ins Co*, 216 Mich App 653, 655; 550 NW2d 577 (1996).

In signing the full unconditional lien waiver, plaintiff waived its right to claim a construction lien. However, we find no authority to suggest either: (1) that a claim under a construction lien is the exclusive remedy for a subcontractor who claims he has not been paid, or (2) that a waiver of lien rights under the statute precludes a breach of contract claim.¹ Plaintiff sought to pursue a breach of contract claim. In this case, a question of material fact existed regarding whether defendant complied with the terms of the contract. Where there exists a disputed issue and further discovery stands a fair chance of producing factual support for a litigant's position, a grant of summary disposition is premature. *Kortas v Thunderbowl and Lounge*, 120 Mich App 84, 87; 327 NW2d 401 (1982). Thus, the trial court properly denied defendant's motion for summary disposition.

Defendant also argues that the trial court abused its discretion in entering a default judgment as a discovery sanction. We disagree. We review discovery sanctions for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

A court should consider four factors when contemplating a default judgment as a discovery sanction: (1) whether the failure to respond to discovery requests extended over a substantial period of time, (2) whether there were any court orders directing discovery that had not been complied with, (3) the amount of time elapsed between any such violation and the motion for default judgment, and (4) whether wilfulness has been shown. *Frankenmuth Mut Ins Co v Aco, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). A default judgment is an appropriate sanction only where there has been a conscious or intentional refusal to facilitate discovery, not where the failure to respond is accidental or involuntary. *Id.* at 397.

Under the *Frankenmuth* factors, we find that the trial court was justified in imposing a default judgment. Defendant had five months to comply with the discovery requests. Defendant failed to comply with two court orders directing it to answer. Nearly three months elapsed between the time plaintiff brought its first motion to compel discovery and the date the default judgment was entered. Most importantly, defendant was forewarned that failure to comply with the court's order would result in a default judgment.² Defendant's subsequent failure to respond to plaintiff's discovery requests can only be described as a flagrant and wanton refusal to facilitate discovery. See *id.* Under these circumstances, the trial court did not abuse its discretion in entering a default judgment.

Affirmed.

/s/ Myron H. Wahls

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

¹ Defendant would have us construe plaintiff's waiver of lien rights as a waiver of right to payment, or as an accord and satisfaction. There is no language in the waiver to support such a construction. Put simply, plaintiff waived its right to liens on defendant's property, but it did not waive any other rights.

² Defendant argues that the trial court failed to consider other options short of a default judgment. In this case, the trial court's initial warning obviated the need for any reconsideration when defendant failed to respond to the court's order. The court rules give a trial court the authority to order a default judgment. MCR 2.313(B)(2)(c). We have no doubt that a trial court acts properly when it determines, in advance, the appropriate sanction for a discovery violation and warns the parties. When a party is aware of the impending sanction, and it continues to flout the court's orders, it is in no position to argue that the trial court should have considered a lesser sanction.