

STATE OF MICHIGAN
COURT OF APPEALS

KRISTINE A HERNDEN,

Plaintiff-Appellant,

v

WILLIAM M. VERNIER, HOPE L. VERNIER, and
GREEN TREE FINANCIAL SERVICING
CORPORATION,

Defendants-Appellees.

UNPUBLISHED

May 21, 1999

No. 206047

St. Clair Circuit Court

LC No. 96-003892 CK

KRISTINE A. HERNDEN,

Plaintiff-Appellant,

v

MARY G. VERNIER, GUY B. LAVELLE, and
GREEN TREE FINANCIAL SERVICING
CORPORATION,

Defendants-Appellees.

No. 206126

St. Clair Circuit Court

LC No. 96-003891 CK

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff Kristine A. Hernden, who does business as AKM Trucking, appeals by right from two separate orders granting summary disposition to defendants William and Hope Vernier, Mary Vernier and Guy LaVelle, and Green Tree Financial Servicing Corporation pursuant to MCR 2.116(C)(10). The trial court found that there was no genuine issue of material fact regarding whether the residential builders act (“RBA”), MCL 339.2401 *et seq.*; MSA 18.425(2401) *et seq.*, and the Construction Lien Act (“CLA”), MCL 570.1101 *et seq.*; MSA 26.316(101) *et seq.*,

deprived plaintiff of the right to sue in this case because she was unlicensed and had not used a written contract. Plaintiff also claims that equity requires resolution in her favor. We affirm.

I

The Residential Builders Act and the Construction Lien Act

Whether the trial court properly ordered summary disposition under MCR 2.116(C)(10) is a question of law which this Court reviews de novo. *Professional Rehabilitation Associates v State Farm Mut Automobile Ins Co (On Remand)*, 228 Mich App 167, 170; 577 NW2d 909 (1998).

We agree with the trial court that plaintiff was a “residential maintenance and alteration contractor” within the statutory definition set forth in MCL 339.2401(b); MSA 18.425(2401)(b)¹ when excavation services were performed for defendants. The RBA requires residential maintenance and alteration contractors who perform excavation work to be licensed. See MCL 339.2404(3); MSA 18.425(2404)(3). It is undisputed that plaintiff was not licensed at any time during the performance of the excavation work for defendants. Therefore, because plaintiff was not licensed, she was precluded under § 2412² of the RBA from maintaining the collection actions against defendants. See *Utica Equipment Co v Ray W Malow Co*, 204 Mich App 476; 516 NW2d 99 (1994), and *Annex Const, Inc v Fenech*, 191 Mich App 219, 220-221; 477 NW2d 103 (1991).

The lower court record does not contain any support for plaintiff's argument that she was exempt from the RBA's licensing requirements and, therefore, outside of the RBA's claim preclusion provision. “Opinions, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule (MCR 2.116[C][10]); disputed fact, or the lack of it, must be established by admissible evidence.” *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 320-321; 575 NW2d 324 (1998). We reject plaintiff's argument that the term "personal labor" is so broad and encompassing that we may consider the personal labor of her employees as her own so that she may qualify for a licensing exception under the RBA. MCL 339.2403(e); MSA 18.425(2403)(e). We note that if she had any evidence to show that she was paid an hourly wage or actually performed personal services for defendants, summary disposition was the appropriate time to provide it for consideration. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

The statute is clear and unambiguous on its face and must be enforced as written. *Utica, supra* at 478. The RBA's claim preclusion for unlicensed builders and contractors “works an undue hardship on some, while providing an unwarranted windfall to others,” but we stand firm in our belief that the statutory prohibition is unambiguous and applies to plaintiff. *Utica, supra* at 478-479; see also *Charles Featherly Construction Co v Property Development Group, Inc*, 400 Mich 198, 203-204; 253 NW2d 643 (1977). The trial court did not err in finding that the RBA barred plaintiff's claim for compensation.

II

The Construction Lien Act

The trial court also did not err in its determination that the CLA barred plaintiff's efforts to enforce her lien on defendants' properties because plaintiff never alleged that there was a *written* contract between her and defendants, much less one that conformed to the CLA. See MCL 570.1114; MSA 26.316(114)³. Plaintiff's argument that the CLA would not require her to comply with the written contract requirement in order to enforce a lien because she was a laborer or supplier is completely without merit because she fits the statutory definition of a contractor as "a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property." MCL 570.1103(5); MSA 26.316(103)(5). Although MCL 570.1302; MSA 26.316(302) states that the CLA is a remedial statute and should be construed liberally, "liberality cannot and should not nullify a clear and unambiguous requirement." *Brown Plumbing & Heating, Inc v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 185; 500 NW2d 733 (1993).

III

Equity

Plaintiff argues that the lower court's decision allowed defendants to be unjustly enriched. However, plaintiff neither pleaded nor presented a claim in equity. Consequently, the issue is not preserved for our review. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Manifest injustice will not result from our refusal to decide this issue because the facts pleaded below do not demonstrate that plaintiff would prevail in a debate concerning the equities of these cases. See, e.g., *Pittsburgh Tube, Co v Tri-Bend, Inc*, 185 Mich App 581, 590; 463 NW2d 161 (1990).

We affirm.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Jane E. Markey

¹ A "residential maintenance and alteration contractor" is "a person who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another for the repair, alteration, or an addition to, subtraction from, improvement of . . . a residential structure" "Residential structure" includes the premises intended to be used for a residence. MCL 339.2401(c); MSA 18.425(2401)(c).

² MCL 339.2412; MSA 18.425(2412) provides that "[a] person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract."

³ Section 114 states, in relevant part, that "[a] contractor shall not have a right to a construction lien upon the interest of any owner or lessee in a residential structure unless the contractor has provided an

improvement to the residential structure pursuant to a written contract between the owner or lessee and the contractor.”