

STATE OF MICHIGAN
COURT OF APPEALS

ERB LUMBER, INC.,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, CONSUMER &
INDUSTRIAL SERVICES, BUREAU OF
OCCUPATIONAL & PROFESSIONAL
REGULATION, and HOMEOWNER
CONSTRUCTION LIEN RECOVERY FUND,

Defendants-Appellants,

and

JULIE MAYNE and RANDALL MAYNE,

Defendants.

UNPUBLISHED

January 18, 2002

No. 220048

Van Buren Circuit Court

LC No. 98-044138-CH

ERB LUMBER, INC.,

Plaintiff-Appellee,

v

JOHN MARK BUILDERS LIMITED, JOHN
MARK DAVIDSON, and 45 Individually Named
Defendants,

Defendants,

and

STATE OF MICHIGAN, CONSUMER &
INDUSTRIAL SERVICES, BUREAU OF
OCCUPATIONAL & PROFESSIONAL
REGULATION, and HOMEOWNER

No. 220710

Kent Circuit Court

LC No. 98-004003-CH

CONSTRUCTION LIEN RECOVERY FUND,

Defendants-Appellants.

ERB LUMBER, INC.,

Plaintiff-Appellee,

v

COSTAL CONSTRUCTION COMPANY and
COMPLETE PAINT & SUPPLY, INC.,

Defendants,

and

DOUGLAS E. SPOONNER, EMIL F. MUCCINO,
SUSAN J. MUCCINO,

Defendants/Counter-Defendants,

and

FIRST CHICAGO NBD MORTGAGE
COMPANY and WOLOHAN LUMBER
COMPANY,

Defendants/Counter-Plaintiffs,

and

HOMEOWNER CONSTRUCTION LIEN
RECOVERY FUND,

Defendant/Counter-Defendant-
Appellant.

ERB LUMBER,

Plaintiff-Appellee,

v

No. 221013
Cheboygan Circuit Court
LC No. 98-006406-CH

No. 225449
Emmet Circuit Court

COASTAL CONSTRUCTION COMPANY and
FIRST COMMUNITY BANK,

LC No. 98-004731-CH

Defendants,

and

DOUGLAS E. SPOONER, WILLIAM A.
WALDRON, JR., and JACQUELINE H.
WALDRON,

Defendants/Cross-Defendants,

and

WOLOHAN LUMBER COMPANY,

Defendant/Cross-Plaintiff,

and

HOMEOWNER CONSTRUCTION LIEN
RECOVERY FUND,

Defendant/Cross-Defendant-
Appellant.

ERB LUMBER, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

DOUGLAS E. SPOONER, COMPLETE PAINT &
SUPPLY, INC., and DANIELS PIG & DIG, INC.,

Defendants,

and

COASTAL CONSTRUCTION COMPANY,
LAWRENCE HABER, and BARBARA HABER,

Defendants/Cross-Defendants,

No. 225450
Emmet Circuit Court
LC No. 98-004732-CH

and

GREAT LAKES PLUMBING & HEATING OF
NORTHERN MICHIGAN, INC.,

Defendant/Cross-Plaintiff,

and

HOMEOWNERS CONSTRUCTION LIEN
RECOVERY FUND,

Defendant/Cross-Defendant-
Appellant.

ERB LUMBER, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

COASTAL CONSTRUCTION COMPANY, OLD
KENT BANK, and DANIELS PIG & DIG, INC.,

Defendants,

and

DOUGLAS E. SPOONER,

Defendant/Cross-Defendant,

and

DANIEL A. BABCOCK, d/b/a/ DANIEL
BABCOCK BUILDER and WOLOHAN
LUMBER COMPANY,

Defendants/Cross-Plaintiffs,

and

MICHAEL S. BARNETT and VICKY L.

No. 225451
Emmet Circuit Court
LC No. 98-004733-CH

BARNETT,

Defendants/Counter-Plaintiffs/
Cross-Defendants,

and

HOMEOWNER CONSTRUCTION LIEN
RECOVERY FUND,

Defendant/Cross-Defendant-
Appellant.

ERB LUMBER, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

No. 225452
Emmet Circuit Court
LC No. 98-004734-CH

COASTAL CONSTRUCTION COMPANY,
DOUGLAS E. SPOONER, OLD KENT BANK,
CASEY ALLEN, d/b/a K.C. CONSTRUCTION,
DAN RAVITO, d/b/a RAVITO DRYWALL,
COMPLETE PAINT & SUPPLY, INC., and
DANIELS PIG & DIG, INC.,

Defendants,

and

PAUL J. GRAY and TERESA O'NEIL GRAY,

Defendant/Cross-Defendant,

and

DANIEL A. BABCOCK, d/b/a DANIEL A.
BABCOCK BUILDER,

Defendant/Cross-Plaintiff,

and

GREAT LAKES PLUMBING & HEATING OF

NORTHERN MICHIGAN, INC.,

Defendant/Cross-Plaintiff/Counter-
Plaintiff,

and

WOLOHAN LUMBER COMPANY,

Defendant/Counter-Plaintiff,

and

HOMEOWNER CONSTRUCTION LIEN
RECOVERY FUND,

Defendant/Counter-Defendant-
Appellant.

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

In these seven consolidated cases, defendant Homeowner Construction Lien Recovery Fund (“the Fund”) appeals as of right from final orders in various trial courts awarding payments to plaintiff under the Michigan Construction Lien Act, MCL 570.1101, *et seq.* In each case, homeowners hired contractors to perform residential construction and fully paid the contractors under their individual contracts. The contractors, however, did not fully pay for the construction materials supplied by plaintiff. Most of the contractors became uncollectable, leaving the Fund as plaintiff’s recourse. The Fund paid the cost of materials in every case, but disputed the trial courts’ findings that it was obligated to pay the “time-price differential” of 1.7 percent a month (essentially a service charge for late payment) that was part of plaintiff’s standard agreement with the contractors. We affirm each case.

A directly analogous situation, again involving plaintiff Erb Lumber, existed in *Erb Lumber Co v Homeowner Construction Lien Recovery Fund*, 206 Mich App 716; 522 NW2d 917 (1994). In *Erb*, this Court held that the time-price differential charged by plaintiff to builders for late payments was recoverable. *Id.* at 720-721. The Court reasoned that because a provision regarding the time-price differential was included in the contract between plaintiff and the general contractor, and because “the amount of the lien is calculated by taking the lien claimant’s contract price, less the amount already paid on it,” see MCL 570.1107, plaintiff was entitled to recover the time-price differential from the Fund. *Id.*

Under MCR 7.215(I)(1), we are obligated to follow *Erb* unless it has “been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals. . . .” The Fund contends that a modification of *Erb* occurred in *Vugterveen Systems v Olde Millpond*, 454 Mich 119; 560 NW2d 43 (1997).

In *Vugterveen*, the property owner fired both his general contractor and subcontractor after a portion of the work had been done on two condominium projects. *Vugterveen, supra* at 125-126. The owner then hired others to complete construction. *Id.* When the subcontractor filed a foreclosure action on its construction lien, the owner defended by showing that he had paid more to complete the projects than he had agreed to pay the original general contractor. *Id.* at 126-127.

The *Vugterveen* Court considered whether MCL 570.1107(6) invalidated the subcontractor’s lien. That section states:

If the real property of an owner or lessee is subject to construction liens, the sum of the construction liens shall not exceed the amount which the owner or lessee agreed to pay the person with whom he or she contracted for the improvement as modified by any and all additions, deletions, and any other amendments, less payments made by or on behalf of the owner or lessee, pursuant to either a contractor’s sworn statement or a waiver of lien, in accordance with this act. [MCL 570.1107(6).]

The Court noted that the act’s purpose was to protect both property owners and builders and that no specific language in the act provided for a situation in which an owner hired a second general contractor to complete a job and ended up paying more than the original contract price. *Id.* at 128-129. The Court further noted that the act is to be liberally construed to effectuate its purposes and that to invalidate an otherwise valid subcontractor’s lien under the circumstances would not give effect to the purpose of protecting builders. *Id.* The Court held that the owner “may not use payments made on the second general contract as a defense to [the subcontractor’s] lien because the payments were not made on the relevant contract.” *Id.* at 129.

The Court further held, however, that the owner *could* use payments made on the first general contract as a defense to the subcontractor’s lien. The Court noted that the owner “will have a defense to [the subcontractor’s] lien if it can show that the sum of payments made pursuant to sworn statements and waivers of lien under the [original] contract plus [the subcontractor’s] claim of lien exceed the price of the [original] contract.” *Id.* The Fund contends that under this language, it need not pay the time-price differential at issue in the instant case, because including the time-price differential essentially holds the owner responsible for more than that for which he contracted. The Fund contends that “[t]he *Vugterveen* [C]ourt’s recognition of the way in which a lien is limited – in favor of the homeowner – necessarily dictates that a homeowner cannot be held responsible, via a construction lien, for the time-price differential which seeks only to increase the contract amount for which the homeowner will ultimately be responsible.”

We cannot agree that *Vugterveen* modified the holding of *Erb*. Indeed, *Vugterveen* addressed a different issue from that raised in *Erb*. It considered whether a *homeowner* can be held responsible, by way of liens, for a *total price* that exceeds the original contract amount. That consideration is not the issue in the instant case. *Vugterveen* did not address whether a subcontractor could recover a *time-price differential* from *the Fund*. Accordingly, *Erb* remains precedential on the issue and squarely resolves the issues raised in the appeals. The trial courts did not err in ruling that plaintiff could recover the disputed charges.

Each case is affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter