STATE OF MICHIGAN

COURT OF APPEALS

HOERSTMAN GENERAL CONTRACTING INC.,

Plaintiff/Counter Defendant-Appellee/Cross Appellant,

v

JUANITA REMS HAHN and C. RONALD HAHN,

Defendants/Counter Plaintiffs-Appellants/Cross Appellees,

and

TEACHERS CREDIT UNION,

Defendant.

UNPUBLISHED
June 15, 2004

No. 244507
Cass Circuit Court
LC No. 2001-000103-CH

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendants appeal as of right the order denying their motion for partial summary disposition as to Count I of plaintiff's complaint and the judgment subsequently entered in plaintiff's favor following a three-day bench trial in this construction lien dispute. Plaintiff cross appeals the trial court's denial of its motion for attorney fees. We reverse the denial of defendants' motion for summary disposition, but affirm in all other respects.

On appeal, defendants first argue that plaintiff failed to prove it was a licensed residential builder as required under MCL 339.2412(1) and the trial court erred when it concluded that this issue was waived pursuant to MCR 2.116(D)(2). We agree in part, only. Although defendants did not raise this issue until closing argument, they cannot be deemed to have waived the issue. See *Reynolds v College Park Corp*, 63 Mich App 325, 327-328; 234 NW2d 507 (1975). However, defendants' closing argument, which was buttressed by their filing of a post-trial brief, was rebutted by plaintiff with the production of proof to the trial court that it was properly licensed. Plaintiff had previously produced this evidence to defendants during the course of the litigation. Accordingly, in compliance with MCL 339.2412(1), plaintiff did allege and prove proper licensure and, thus, was entitled to pursue lien foreclosure and breach of contract claims.

Next, defendants argue that the trial court should have granted their motion for summary disposition as to Count I of plaintiff's complaint, which sought foreclosure of an alleged claim of lien. We agree. This Court reviews a trial court's decision on a motion for summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defendants claim that specific requirements of the Construction Lien Act (CLA) were not met, invalidating plaintiff's claim of lien. Generally, MCL 570.1114 requires that (1) the work be performed pursuant to a written contract, (2) all changes to the contract be in writing, and (3) such contract inform the owner that the contractor must be licensed and that the contractor is, in fact, licensed. Here, the changes to the contract were not in writing and no licensing information was contained in the contract. Further, defendants argue, MCL 570.1110(1)(a) required that plaintiff provide the owner with a sworn statement whenever payment was due or requested and MCL 570.1117(7) required plaintiff to allege in its complaint such compliance. Here, no statements were provided and it was not alleged in plaintiff's complaint. Plaintiff responds, first, that MCL 570.1114 could not be complied with because defendant C. Ronald refused to sign change orders and, second, it substantially complied with this requirement, as well as the other two, by performing the work.

MCL 570.1114 of the CLA provides:

> 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 and any amendments or additions to the contract also shall be in writing. The contract required by this section shall contain a statement, in type no smaller than that of the body of the contract, setting forth all of the following:
>
> (a) That a residential builder or a residential maintenance and alteration contractor is required to be licensed . . . .
>
> (b) If the contractor is required to be licensed to provide the contracted improvement, that the contractor is so licensed.
>
> (c) If a license is required, the contractor's license number.

In this case, it is uncontested that the changes to the contract were not in writing and that the contract did not contain the required licensure information. Plaintiff's claim that the "written change" provision should not be enforced against him because defendant C. Ronald refused to sign a change order was not argued in the trial court in response to the motion and, thus, may not be considered by this Court. And, in any event, plaintiff has failed to present any authority that such refusal, even if proved, would have negated the statutory mandate.

Further, plaintiff's claim of "substantial compliance" to the statutory "written change" and licensure information requirements merely by the performance of work is without merit. With regard to statutory construction, our Supreme Court has repeatedly held that when a

statute's language is clear and unambiguous, we must assume that the Legislature intended its plain meaning which must be enforced as written. See, e.g., *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). It has further held that "liberality cannot and should not nullify a clear and unambiguous requirement." *Brown Plumbing & Heating, Inc v Homeowner Constr Lien Recovery Fund*, 442 Mich 179, 185; 500 NW2d 733 (1993). Here, MCL 570.1114 mandates, through the use of the word "shall," that amendments or additions to the written contract be in writing and that the contract include certain licensure information. These are clear and unambiguous requirements. Even if we assumed for the sake of this argument that the "substantial compliance" provision, MCL 570.1302(1), applied, we could not conclude that plaintiff substantially complied with MCL 570.1114 merely because he performed requested work. Accordingly, the trial court erred when it denied defendants' motion for summary disposition as to Court I of plaintiff's complaint for foreclosure on the claim of lien because the claim of lien was invalid for failure to comply with the clear and unambiguous statutory requirements. In light of this conclusion, we need not consider whether plaintiff complied with MCL 570.1110(1)(a) or 570.1117(7). Because plaintiff is not entitled to a claim of lien, all references to such claim of lien contained within the trial court's judgment must be vacated and an amended judgment entered.

Next, defendants argue that an accord and satisfaction was reached between the parties because plaintiff cashed a check containing the words "final payment" that defendants tendered in the amount of $5,144.79 in response to plaintiff's claim that $16,910.79 was due and owing. We disagree.

The doctrine of accord and satisfaction is based on contract principles and is an affirmative defense to which the defendant has the burden of establishing. *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 646; 482 NW2d 474 (1992). The doctrine was explained by this Court in *Faith Reformed Church v Thompson*, 248 Mich App 487; 639 NW2d 831 (2001), as follows:

> An 'accord' is an agreement between parties to give and accept, in settlement of a claim or previous agreement, something other than that which is claimed to be due, and 'satisfaction' is the performance or execution of the new agreement. To prove the existence of an accord and satisfaction, a defendant must show (1) its good-faith dispute of (2) an unliquidated claim of the plaintiff, (3) its conditional tender of money in satisfaction of the claim, and (4) the plaintiff's acceptance of the tender (5) while fully informed of the condition. A defendant need not show a plaintiff's express acceptance of the condition; rather, the law of accord and satisfaction is that where a creditor accepts a conditional tender, the creditor also agrees to the condition. However, the expression of the condition must be 'clear, full, and explicit.' [*Id.* at 491-492, citing *Nationwide, supra* at 646-647 (citations omitted).]

An accord and satisfaction was not reached here. This Court has repeatedly held that in order to effect an accord and satisfaction, "the tender must be accompanied by an explicit and clear condition indicating that, if the payment is accepted, it is accepted in discharge of the whole claim." *In re MCI Telecommunications Complaint*, 255 Mich App 361, 367; 661 NW2d 611 (2003). The words "final payment" written on a check was not sufficient to inform plaintiff that

its acceptance of the check discharged the whole claim. See, e.g., *Faith Reformed Church, supra* at 493.

Next, defendants argue that the trial court improperly admitted evidence in support of plaintiff's claim for damages that exceeded the amount of the fixed fee contract. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Essentially, defendants argue that they should not be liable for any amount over and above the amount expressed in the fixed fee contract and, thus, the admission of any evidence in support of such a claim was erroneous as irrelevant. The trial court held that defendants waived the contractual requirement that all changes be written. We agree with this conclusion. Defendants admit that they verbally requested and authorized extensive changes to the contract. The law of contracts recognizes that parties to a contract may modify or waive their own requirements. See *Minkus v Sarge*, 348 Mich 415, 421-422; 83 NW2d 310 (1957). Further, "[g]enerally, evidence of changes in the contract, and their costs, is by necessity admissible to show the modification or abandonment of the contract. Indeed, when the burden is put on the party to introduce evidence to show a change in the contract, he must be permitted to introduce evidence to substantiate his position." *Dault v Schulte*, 31 Mich App 698, 702; 187 NW2d 914 (1971) (citation omitted). Consequently, the evidence that defendants claim was irrelevant, i.e., testimony regarding an estimate for the remodel and testimony regarding the total cost of completing the project, was relevant and, thus, properly admitted by the trial court.

Next, defendants argue that the trial court failed to render findings of fact, as required by MCR 2.517(A), with regard to their counterclaim accounting of the amounts owed for the project. We disagree.

MCR 2.517(A) requires the trial court, in bench trials, to "find the facts specially, [and] state separately its conclusions of law[.]" MCR 2.517(A)(1). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Findings are sufficient if "it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

Here, in its recitation of the facts, the trial court acknowledged the factual dispute between the parties with regard to the outstanding balance on this project. The court referenced both plaintiff's accounting and defendants' accounting as set forth in their trial exhibits and reached the conclusion that plaintiff's was the accurate accounting. Accordingly, the requirements of MCR 2.517(A) were fulfilled.

Finally, defendants argue that they were entitled to attorney fees pursuant to MCL 570.1118(2). The CLA does authorize the recovery of "reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious." MCL 570.1118(2). Defendants failed to set forth any persuasive argument in support of their claim of entitlement, including why, if at all, plaintiff's action was vexatious. This Court will not discover and rationalize the basis for their claims. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Although we concluded above that

plaintiff's claim of lien was invalid, such finding does not automatically lead to a determination in defendants' favor and they are not relieved of their responsibility to appropriately argue the merits of this issue; therefore, this issue is deemed abandoned.

On cross appeal, plaintiff argues that the trial court misinterpreted MCL 570.1118(2) and, thus, erroneously failed to award it attorney fees. However, because plaintiff's claim of lien was invalid and it had no rightful claim under the CLA, it was not entitled to attorney fees under MCL 570.1118(2).

Affirmed in part and reversed in part. The trial court's denial of defendants' motion for summary disposition as to Court I of plaintiff's complaint, foreclosure of claim of lien, is reversed and those provisions of the judgment related to such lien are vacated. The judgment is affirmed in all other respects. This matter is remanded to the trial court for entry of an amended judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski