STATE OF MICHIGAN

COURT OF APPEALS

PRESTIGE PAVERS, INC,

Plaintiff/Counter-Defendant,

v

ESTATE HOMES, LLC, PALAZZO HOLDING GROUP, LLC, CITIZENS FIRST SAVINGS BANK, CITIZENS FIRST MORTGAGE, LLC, and M & M ELECTRIC,

Defendants/Cross-Defendants,

and

RICHARD WEILER and CYNTHIA WEILER,

Defendants/Cross-Plaintiffs/Cross-Defendants-Appellees,

and

CONSUMERS LUMBER COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff-Appellant.

UNPUBLISHED
May 20, 2008

No. 276139
Macomb Circuit Court
LC No. 2005-004413-CK

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Consumers Lumber Company (CLC) appeals as of right from a circuit court order granting Richard and Cynthia Weiler's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. FACTS

In June of 2004, the Weilers contracted with Estate Homes LLC (Estate Homes), to build a home in Macomb County. The total modified contract price for the real property and the completed home was $391,285.00. The Weilers paid Estate Homes uncontested[1] amounts totaling $368,285.00, withholding a final $23,000 payment because the work done by Estate Homes was incomplete.

On October 26, 2004, Estate Homes entered into a purchase agreement with CLC. The purchase agreement included lumber, trusses, and windows for the Weilers' property. After the purchase agreement was executed, Estate Homes delivered a notice of commencement to CLC. The notice of commencement incorrectly indicated that Estate Homes was the "owner" of the property. Based on the notice of commencement from Estate Homes, CLC sent a MCL 570.1109 notice of furnishing[2] to Estate Homes on December 20, 2004. The Weilers did not receive a notice of furnishing from Estate Homes or CLC for the materials supplied by CLC.

After supplying materials to the construction site in accordance with the purchase agreement, CLC filed a claim of lien on the Weilers' property on July 22, 2005, in the amount of $38,664.55. On January 22, 2006, CLC filed a foreclosure action against the Weilers.

The Weilers did not dispute that CLC had a valid lien. Instead, the Weilers argued that under MCL 570.1203(1), they may avoid the lien because they paid funds to Estate Homes that were intended to satisfy the amounts owed to CLC. In support of this assertion, the Weilers filed an affidavit averring that they had paid Estate Homes for CLC's improvement to the property.

The Weilers thereafter moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Mr. Weiler filed a supplemental affidavit in support of the motion for summary disposition. The Weilers argued that the supplemental affidavit prevented CLC's lien from attaching to the property under the Construction Lien Act (CLA), MCL 570.1101, *et seq*., and more specifically, under MCL 570.1203(1).

Mr. Weiler's supplemental affidavit stated that subcontractor Elite Poured Walls (Elite), filed a lawsuit against Estate Homes and the Weilers before Mr. Weiler made a $60,000 progress payment to Estate Homes. Elite brought suit to foreclose the construction lien it had on the Weilers' property. Mr. Weiler averred that this was the first time he had any reason to believe that Estate Homes had failed to pay any subcontractor or material supplier. According to the affidavit, Estate Homes told Mr. Weiler that it was purposely withholding payment because Elite did not complete its job. The Weilers agreed to have $17,000 of the $60,000 progress payment held in escrow by Estate Homes's attorney so that Elite would discharge its lien. According to

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[1] Estate Homes instructed the Weilers to make some payments to Estate Homes and other payments to Woodland Estates LLC. As both entities are owned and controlled by the same individual, and were used interchangeably during this matter, any distinction between these payments is immaterial for this appeal.

[2] The notice of furnishing "notifies owners of the identity of subcontractors improving the property who may become future lien claimants." *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 122; 560 NW2d 43 (1997).

Mr. Weiler, Estate Homes told him that the remaining $43,000 must be paid or that Estate Homes would not be able to continue construction or pay off the other debt owed on the unit. Estate Homes assured Mr. Weiler that the remaining $43,000 would be used "to payoff **any** other potential liens claimants."

The Weilers' motion was heard on November 20, 2006. The trial court granted summary disposition in favor of the Weilers and ordered CLC's lien discharged. In granting the motion, the court stated:

> Mr. Weiler's supplemental affidavit indicates that … [t]he fourth $60,000 progress payment on April 22 [sic], 2005 was to pay any other debts and any other potential lien claimants. It is clear to the court that the money paid by the Weilers to Defendant Estate Homes included payment for the materials provided by defendant Consumers Lumber. The affidavit complies with MCL 570.1203, sub one. The Weilers clearly intended to and did pay for any materials provided, or any material supplied for their house by Consumers Lumber.

II. STANDARD OF REVIEW

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The moving party has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Healing Place v Allstate Ins Co*, 277 Mich App 51, 63; ___ NW2d ___ (2007). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of material fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006) "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Statutory interpretation presents a question of law and is also reviewed de novo. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999).

III. ANALYSIS

The CLA "is designed to protect the rights of lien claimants to payment for expenses and to protect the rights of property owners from paying twice for these expenses." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 373; 652 NW2d 474 (2002). The Homeowner Construction Lien Recovery Fund[3] was "expressly created 'to provide payment to

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[3] Due to a "clerical oversight," CLC is not a member of the fund and is therefore unable to recover from the fund in this case. If CLC had been a member of the fund, the fund would have had the right to assert the same defenses against Mr. Weiler's affidavit as CLC is currently asserting. MCL 570.1203(1) and (2); *Erb Lumber, supra* at 395; see also *DLF Trucking, Inc v Bach*, 268 Mich App 306, 312 n 3; 707 NW2d 606 (2005) (noting that plaintiff's inability to

(continued…)

subcontractors or suppliers when a homeowner has already paid a contractor once in full for an improvement to his house but the contractor misused or misappropriated the money without first paying the supplier . . . .'" *DLF Trucking, Inc v Bach*, 268 Mich App 306, 312 n 3; 707 NW2d 606 (2005), quoting *Erb Lumber, supra* at 391.

Section 203 of the CLA provides the requirements that must be fulfilled for a construction lien not to attach for amounts the homeowner already paid to the contractor:

> (1) A claim of construction lien does not attach to a residential structure, to the extent payments have been made, if the owner or lessee files an affidavit with the court indicating that the owner or lessee has done all of the following:
>
> (a) Paid the contractor for the improvement to the residential structure and the amount of the payment.
>
> (b) Not colluded with any person to obtain a payment from the fund.
>
> (c) Cooperated and will continue to cooperate with the department in the defense of the fund.
>
> (2) In the absence of a written contract pursuant to section 114, the filing of an affidavit under this section creates a rebuttable presumption that the owner or lessee has paid the contractor for the improvement. The presumption may be overcome only by a showing of clear and convincing evidence to the contrary. [MCL 570.1203.]

Therefore, to successfully defeat CLC's construction lien on a motion for summary disposition, the Weilers must have offered undisputed evidence that they paid the contractor, Estate Homes, for CLC's improvement to the residential structure.

To support their motion for summary disposition, the Weilers provided Mr. Weiler's supplemental affidavit, which stated that although no specific subcontractors or material providers were mentioned in his conversation with Estate Homes, part of the $60,000 progress payment made on April 27, 2005, was intended to pay any other debts and any other potential lien claimant. The Weilers also provided evidence that CLC was a lien claimant at the time this payment was made.

Mr. Weiler's affidavit shifted the burden to CLC to show that a genuine issue of material fact exists as to whether the Weilers paid the Estate Homes for the improvements supplied by CLC. *Coblentz*, *supra* at 569. We find that CLC failed to meet its burden.

(…continued)

recover from the fund is the "product of plaintiff's failure to voluntarily become a member of the fund before providing the improvements for which it now claims a lien . . . rather than any deficiency of the CLA to meet its purpose of protecting plaintiff's right as a contractor to payment").

CLC did not provide any evidence to create a genuine issue as to whether the Weilers paid Estate Homes for the improvements supplied by CLC. CLC did not present any evidence that the Weilers' payment was intended to pay for a different debt or other lien claimant. CLC failed to present any evidence that the Weilers' payment was in fact applied to another debt or other potential lien claimant. Additionally, CLC was unable to rebut Mr. Weiler's affidavit by providing evidence that CLC was not a lien claimant at the time the Weilers made the payment.

In *Erb Lumber*, *supra* at 398, this Court held that owners who had not paid the full contract price, but paid the contractor in advance for the materials provided by a lien claimant, had a defense to the lien under MCL 570.1203. The homeowners paid $29,728.90 of the $36,780.90 contract price. *Id.* at 390. The lower court found that "the contractor did tell the [homeowners] that he needed advance payments in order to pay for materials, **but did not specify to whom the payments would be made**." *Id*. at 392, n 2 (emphasis added). Testimony at a bench trial allowed the trial court to find that the homeowners paid the general contractor specifically for the materials supplied by the lien claimant. *Id.* at 391.

While CLC correctly notes that the trial court in *Erb Lumber* made a finding of fact that the homeowners paid the general contractor specifically for the materials supplied by the lien claimant, such a finding was not necessary in this case because CLC failed to meet its burden of presenting evidence to dispute the Weilers' assertion that their $60,000 payment was made in order to pay for the materials supplied by CLC. Based on the affidavit submitted by Mr. Weiler, and the lack of evidence refuting the affidavit, whether the homeowners paid the general contractor specifically for the materials supplied by CLC was not a genuine issue of material fact. Reasonable minds could not disagree that a portion of the $60,000 payment was made to pay for materials from CLC, as well as any other potential lien claimants.

CLC also argues that the trial court erred in not holding CLC's lien valid on the remaining $23,000 owing on the contract. We disagree. If the Weilers made the $60,000 payment in order to pay for materials from CLC, CLC's lien would not attach regardless of the $23,000 owed on the contract. *Erb Lumber*, *supra* at 399. Allowing CLC's lien to attach after the Weilers paid for the improvement would effectively cause the Weilers to pay for their improvement twice. This contradicts the statute's purpose of protecting property owners from paying twice for these expenses. *Solution Source*, *supra* at 373.

Finally, CLC argues that because the Weilers have not paid the total contract price, only proof of payment pursuant to a lien waiver or sworn statement is sufficient to defeat its construction lien. We disagree. Although proof of payment pursuant to a lien waiver or sworn statement would certainly defeat CLC's construction lien, payment in this manner is not a requirement for protection under MCL 570.1203. Had the drafters intended this requirement, MCL 570.1203(1) could read "to the extent payments have been made *pursuant to lien waivers or sworn statements.*" CLC relies on the dissent in *Erb Lumber* for its position. The dissent in *Erb Lumber* wanted to remand to the trial court to determine whether payments were made pursuant to sworn statements or lien waivers. The majority found that remand was unnecessary because the parties did not dispute the amount of the lien or that payments were made only to the contractor and not directly to Erb Lumber. *Erb Lumber*, *supra* at 399-400. In the instant case, the parties, likewise, do not dispute the amount of CLC's lien or that all payments were made solely to the contractor Estate Homes. Proof of payment pursuant to a lien waiver or sworn statement is not necessary under the majority's holding in *Erb Lumber*. If it is undisputed that

the homeowners paid the general contractor for the subcontractor's improvement, the homeowners are protected by MCL 570.1203 from paying double for this improvement.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette