

STATE OF MICHIGAN
COURT OF APPEALS

SOUTHEASTERN TILE LLC,

Plaintiff/Counter-Defendant-
Appellant,

v

PHILLIP PIERCE and SHERRI PIERCE,
Defendants/Counter-
Plaintiffs/Cross-Defendants/Third-
Party Plaintiffs-Appellees,

and

ODELL JONES III,

Third-Party Defendant-Appellee,

and

BUMLER MECHANICAL, INC.,

Third-Party Defendant/Counter-
Plaintiff/Cross-Plaintiff/Third-Party
Plaintiff,

and

ULRICH LUMBER & BUILDERS SUPPLY,
INC., PATRIE CONSTRUCTION COMPANY,
and HOMEOWNERS CONSTRUCTION LIEN
RECOVERY FUND,

Third-Party Defendants/Counter-
Defendants/Cross-Defendants,

and

PROGRESSIVE MECHANICAL, INC., and
RUSSELL PLASTERING COMPANY,

Intervening Plaintiffs,

UNPUBLISHED

April 26, 2011

No. 294230

Wayne Circuit Court

LC No. 08-110552-CH

and

COMMUNITY CENTRAL BANK
CORPORATION,

Defendant,

and

COMMUNITY CENTRAL MORTGAGE
COMPANY, LLC,

Third-Party Defendant.

JOMAR BUILDING COMPANY, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

SOUTHEASTERN TILE, LLC,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

DAVID L. HARVEY,

Defendant/Counter-Plaintiff,

and

ODELL JONES III,

Third-Party Defendant-Appellee.

No. 294231
Wayne Circuit Court
LC No. 08-110989-CZ

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals the trial court's decisions to award attorney fees and costs in the amount of \$12,200.00 to defendants, Phillip and Sherri Pierce, and the trial court's holding that Odell Jones III was not personally liable for the check. We affirm.

Southeastern Tile was a subcontractor for Jomar Building Company in the renovation of the Pierces' house. After some work was completed, Southeastern was given a check from Jomar signed by Jones. The check was not honored and Southeastern stopped work on the project until payment was made. Southeastern was never paid and eventually filed a lien against the Pierces' house because of the outstanding tile work that remained unpaid.

Neither Jomar nor Jones had a residential builders' license and Southeastern ultimately stipulated to an order dismissing its claim against the Pierces and releasing its lien. After the case was dismissed, the Pierces filed a motion for attorney fees and costs. An evidentiary hearing was ordered during the motion for costs and fees. At the evidentiary hearing, the trial court awarded the Pierces \$12,200.00. Southeastern's motion for reconsideration was denied. Southeastern also filed a motion for summary disposition against Jones for the check that was not paid by the bank. The trial court held that Jones was not personally liable for the check.

The trial court is reviewed for an abuse of discretion when it is using its authority to sanction litigants. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963). Generally, an appellate court should defer to the trial court's judgment; if the trial court's judgment falls within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), cert den 549 US 1206; 127 S Ct 1261; 167 L Ed 2d 76 (2007). The *Maldonado* standard has been applied to a decision to award attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

A residential building contractor must be properly licensed in order to sue a homeowner. MCL 570.1114. MCL 570.1114a(2) states:

If the court in an action under subsection (1) determines that the person who recorded the lien was not licensed as required, the person is liable to the person who brought the action for all damages that result from the recording and any attempts to enforce the lien, including actual costs and attorney fees.

When interpreting statutes, the court will enforce the plain and ordinary meaning of the language used in the statute. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 72 (2007), cert den 552 US 950; 128 S Ct 391; 169 L Ed 2d 264 (2007); *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006). And, the Legislature is presumed to have intended whatever meaning is plainly expressed. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). Here, the statute clearly states that a person who records a lien while unlicensed is responsible for all costs resulting from trying to enforce the lien. Stripping the unlicensed builder of the right to sue is a penalty. *Kirkendall v Heckinger*, 403 Mich 371, 374; 269 NW2d 184 (1978), quoting *Charles Featherly Constr Co v Property Dev Group, Inc*, 400 Mich 198, 203; 253 NW2d 643 (1977).

Southeastern first argues that it should not be responsible for the Pierces' costs and attorney fees because the Pierces did not give Southeastern notice that they would be filing a motion for costs and attorney fees. But, the Pierces alleged from the beginning of this action in their affirmative defenses that Southeastern did not have the appropriate builders' license. This lack of license was a complete defense to Southeastern's suit on the lien and Southeastern had

notice of the defense when it was alleged in the affirmative defenses. Southeastern also had notice of the Pierces' ability to recover costs and attorney fees according to MCL 570.1114a(2) at the time those affirmative defenses were filed. The trial court did not abuse its discretion in awarding costs and attorney fees.

Southeastern next argued that it should only be responsible for costs and attorney fees for the period of time from when it received notice of the Pierces' claim until it dismissed the case. However, even after dismissal, Southeastern continued the litigation by filing a motion for summary disposition when the Pierces' contacted Southeastern about costs and attorneys fees. MCL 570.1118(2) states that "the court also may allow reasonable attorney fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien . . . was vexatious."

While the statute does not define the term, Black's defines "vexatious" as "without reasonable or probable cause or excuse; harassing; annoying." Black's Law Dictionary (9th ed 2009). MCL 570.1114a(2) explicitly states that a person is liable for damages for enforcing a lien when they are not properly licensed. Even after Southeastern learned that neither it nor Jomar was properly licensed, it filed a motion for summary disposition. The motion for summary disposition was frivolous, at best, and was no doubt "without reasonable or probable cause or excuse; harassing; annoying." The trial court did not abuse its discretion in determining that Southeastern's actions were vexatious and that Southeastern was responsible for the costs and attorney fees incurred by the Pierces even after dismissal.

Additionally, the amount awarded for costs and attorney fees was below the amount requested by the Pierces and only included work that the Pierces' attorney did for the case between Southeastern and the Pierces. The trial court did not abuse its discretion in awarding \$12,200.00 in costs and attorney fees.

Southeastern next argues that the trial court abused its discretion when it, sua sponte, ordered the Pierces to amend their complaint to include a request for costs and fees. Southeastern did not preserve this issue because it did not object to this motion during the evidentiary hearing, but even if the issue had been preserved, the decision did not result in any injustice. A trial court's decision that resulted in injustice is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *PT Today, Inc v Comm'r of Fin & Ins Serv*, 270 Mich App 110, 142; 715 NW2d 134 (2006). A court may grant leave to amend a complaint when it is required by justice. MCR 2.118(A)(2). Amendments should be allowed except when the opposing party would be prejudiced. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

MCL 570.1114a(1) states, "The owner of residential property on which a construction lien has been recorded by a person who was not licensed as described in section 114, or any person affected by the lien, may bring an action to discharge the lien." MCL 570.1114a is designed to encourage residential contractors to have the appropriate license. If the contractor does not have the appropriate license, he may not sue the homeowner. If the contractor sues the homeowner without the appropriate license, he will be liable for the homeowner's costs and attorney fees according to MCL 570.1114a(2).

Even if the complaint had not been amended, the Pierces would still be entitled to costs and attorney fees because Southeastern sued them without the appropriate residential builder's license. The Pierces filed a counter-complaint requesting the construction lien be removed from the house and an affirmative defense that Southeastern did not have the proper builder's license. Southeastern either knew or should have known that the Pierces would be entitled to these costs and attorney fees. There was no injustice when the trial court sua sponte ordered the Pierces to amend their complaint because the Pierces were already entitled to costs and attorneys fees.

Southeastern last appeals the trial court's finding that MCL 600.2952(1) does not apply in this case. MCL 600.2951(1) states:

In addition to applicable penal sanctions, a person who makes, draws, utters, or delivers a check, draft, or order for payment of money upon a bank or other depository, person, firm, or corporation that refuses to honor the check, draft, or order for lack of funds or credit to pay or because the maker has no account with the drawee is liable for the amount of the dishonored check, draft, or order, plus a processing fee, civil damages, and costs, as provided in this section.

Statutes are interpreted according to the plain and ordinary meaning of the language used in the statute. *Fluor Enterprises*, 477 Mich at 174; *Gillis*, 474 Mich at 115. The purpose of this statute is to protect payees from makers who write checks without enough funds or credit to pay them. There is no evidence that the check was dishonored because of a lack of funds; rather, the check was not paid because the account was frozen. The trial court correctly interpreted this statute and properly found that it did not apply in this case.

Even if the statute applied, Jones was not personally liable for the check. Southeastern argued that MCL 440.3104(6) could be interpreted to mean that the person who signs the note can be personally liable. MCL 440.3104(6) defines the maker of a check as "a person who signs or is identified in a note as a person undertaking to pay." In this case, the maker was an officer of the corporation on whose account the check was drawn. Generally, an officer of a corporation is not personally liable unless he or she has "committed fraud or tortious or criminal acts." *Tross v H E G Clarke Co*, 274 Mich 263, 266; 264 NW 365 (1936); *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). Specifically, if an officer is authorized to sign an instrument in a representative capacity, that officer is not personally liable for the instrument. *Wright v Drury Corp*, 229 Mich 542, 546; 201 NW 484 (1924). Here, there is no evidence that Jones signed the check as anything other than an officer of Jomar. Accordingly, Jones is not personally liable for the check.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell