STATE OF MICHIGAN

COURT OF APPEALS

ROGER INGELS LEASING, INC.,

Plaintiff-Appellee,

v

JO-RAH, LLC,

Defendant-Cross-Defendant,

and

REPUBLIC BANK,

Defendant,

and

MATTHEW BRAUZE, CHRISTINA L. BRAUZE, and CITIZENS BANK,

Defendants/Cross-Plaintiffs-Appellants.

UNPUBLISHED
August 18, 2011

No. 296495
Livingston Circuit Court
LC No. 07-023320-CK

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendants, Matthew Brauze, Christina Brauze, and Citizens Bank appeal as of right the trial court's opinion and order granting a judgment of foreclosure in favor of plaintiff, Roger Ingels Leasing, Inc. On appeal, defendants argue that the trial court erred by failing to apportion plaintiff's lien, concluding that plaintiff was entitled to a remedy against defendants even though it had previously elected a different remedy, denying defendants' motion to amend the defenses, awarding plaintiff interest on its lien, and allowing plaintiff to proceed without providing defendants with a sworn statement. Because we conclude there were no errors requiring reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

This case concerns a construction lien on a condominium purchased by the Brauzes located in Tyrone Township. The condominium, Unit 23, is part of a 50-unit complex known as

the Hills of Tyrone West Condominiums. In July 2005, Jo-Rah LLC (Jo-Rah) acquired land in Tyrone Township and plotted out the condominium complex. To purchase the property, Jo-Rah obtained a $2,250,000 loan from Republic Bank, secured by a mortgage. Republic Bank recorded its mortgage on December 28, 2004.

To prepare the land for construction, Jo-Rah contracted with plaintiff on June 3, 2005, to clear the land and provide land balancing, earth movement, and the installation of roads, curbs, and sewers. The total cost of the contract was initially $627,000; over the term of the contract, the price increased due to several change orders. The contract required that all payments be made within ten days of receiving the invoice or a 1.5 percent charge would be added every month. Additionally, plaintiff and Jo-Rah agreed that Jo-Rah would pay $2,000 in interest for the change orders if payment were delayed until December 31, 2006.

Plaintiff began work in June 2005 and completed the job in October 2006. When Jo-Rah failed to pay the bill in full, plaintiff acquired a construction lien against each of the remaining 32 condominium units still owned by Jo-Rah. The amount of the claim of construction lien was $60,729.50, plus a time price difference charge accruing at 1.5 percent a month.[1] Plaintiff recorded its construction lien on December 28, 2006.

On August 20, 2007, the Brauzes purchased Unit 23 for $99,900. Unit 23 was one of the 32 units covered under plaintiff's construction lien. To facilitate the purchase, the Brauzes procured a mortgage from defendant Citizens Bank in the amount of $89,910. The title commitment provided at closing not only listed Republic Bank's original mortgage encumbering the property but also clearly reflected plaintiff's construction lien in the amount of $60,729.50. By the time defendant Brauzes closed on Unit 23, Republic Bank had been acquired by defendant Citizens Bank.

Instead of paying off the entire construction lien, $2,500 was placed in escrow for plaintiff's claim of lien, which represented a pro rata share of the construction lien as apportioned among all 32 units. The Brauzes paid $79,147.07 to discharge Republic Bank's (now Citizens Bank's) mortgage encumbering Unit 23, and the remaining money was used to pay closing costs and other miscellaneous fees. Plaintiff's construction lien was not paid or discharged.

On December 14, 2007, plaintiff filed a complaint for foreclosure of the construction lien and unjust enrichment against Jo-Rah, Republic Bank, the Brauzes, and Citizens Bank. Plaintiff's foreclosure claim requested that the trial court order the sale of all the condo units covered under its construction lien, including the Brauzes' Unit 23. Plaintiff's unjust enrichment claim requested that the trial court enter a judgment in its favor against all the defendants jointly and severally, in the amount of $60,729.50.

[1] The claim of lien stated that the contract was for the amount of $774,338.15 and that plaintiff received payment in the amount of $713,608.65.

The Brauzes and Citizens Bank filed a cross-complaint against Jo-Rah asserting that Jo-Rah had breached the covenants of seisen, of the right to convey, for quiet enjoyment against encumbrances, and of warranty for failing to disclose and pay-off plaintiff's construction lien. Jo-Rah failed to answer the cross complaint; consequently, the trial court entered a default judgment against Jo-Rah on the cross- complaint.

In December 2008, a consent judgment was entered against Jo-Rah in favor of plaintiff. The judgment awarded plaintiff $60,729.50, plus 1.5 percent interest ($81,172.09 through August 31, 2008) and a judgment of foreclosure requiring the sale of all or part of 31 condo units that plaintiff's lien covered in order to satisfy the judgment. The Brauzes' Unit 23 was not included in the consent judgment. Additionally, plaintiff and Jo-Rah agreed that the consent judgment would have no effect on the priority of plaintiff's construction lien and no impact on the validity of any mortgage interest held by Republic Bank and/or Citizens Bank. Plaintiff then dismissed its complaint against Republic Bank by stipulation.

Thereafter, defendants moved for summary disposition arguing that plaintiff's construction lien was required to be apportioned among the original 32 units that it covered under the Construction Lien Act (CLA), MCL 570.1101 *et seq*. Defendants further requested that they be allowed to amend their affirmative defenses to add a claim of equitable subrogation alleging that when defendant Citizens Bank acquired defendant Republic Bank, Citizens Bank acquired Republic Bank's priority. The trial denied defendants' motion, stating that although the trial court tended to agree that the case presented an apportionment type situation, it did not believe that summary disposition was appropriate at that point.

The case then proceeded to a bench trial. On the date set for the bench trial, the parties informed the trial court that there were no factual disputes and that only three issues remained to be decided: (1) the issue of apportionment, and whether the construction lien was to be apportioned amongst the 32 units; (2) the issue of election of remedies, and whether plaintiff had elected its remedy by obtaining a judgment of foreclosure against the 31 other units; and (3) the issue of interest, and whether interest was allowed on plaintiff's construction lien.

On November 13, 2009, the trial court issued a written opinion and order in favor of plaintiff and entered a judgment of foreclosure for the full $60,729.50 against defendants. The trial court found that apportionment was not required under the CLA and that plaintiff's claim was not barred by plaintiff's consent judgment with Jo-Rah. Finally, the court found that the plaintiff's claim of interest was enforceable. The trial court's judgment was entered on January 21, 2010. The trial court also ordered defendants to pay plaintiff $5,237 in attorney fees and costs.

II. APPORTIONMENT OF THE LIEN

Defendants first argue that the trial court erred in concluding that apportionment is not required under the CLA under the circumstances presented here. We disagree.

The interpretation of the CLA is reviewed de novo. *Stock Building Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC*, ___Mich App___, ___; ___ NW2d ___ (Docket No. 294098, issued January 25, 2011), slip op p 9. "An action to enforce a construction lien through

foreclosure is equitable in nature." MCL 570.1118(1). We review equity cases de novo, *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010), but will not reverse a trial court's factual findings unless we are convinced that a lower court's findings are clearly erroneous, *Calvary Presbyterian Church, v Presbytery of Lake Huron of the United Presbyterian Church in the United States of America*, 148 Mich App 105, 109-110; 384 NW2d 92 (1986). However, in a case such as this one, where the trial court makes findings of fact based on a settled record, and the court does not see and hear witnesses, we are not bound by the clearly erroneous standard and instead review the record de novo. *Vergote v K Mart Corp*, 158 Mich App 96, 106; 404 NW2d 711 (1987).

The CLA provides the general rules for the attachment of a construction lien. With regard to condominiums, MCL 570.1126(1) provides in part:

> (1) A construction lien, concerning a condominium, arising under this act is subject to the following limitations:
>
> (a) *Except as otherwise provided in this section*, a construction lien for an improvement furnished to a condominium unit or to a limited common element shall attach only to the condominium unit to which the improvement was furnished.
>
> (b) A construction lien for an improvement authorized by the developer of a condominium project and performed upon the common elements shall attach only to condominium units owned by the developer at the time of recording of the claim of lien.
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> * * *
>
> (2) This section shall be subject to the definitions and limitations of Act No. 59 of the Public Acts of 1978, being sections 559.101 to 559.272 of the Michigan Compiled Laws. [Emphasis added.]

Defendants argue that MCL 570.1126(1)(a) applies in this case because plaintiff furnished improvements to the individual condominium units or to the limited common elements, its lien is limited to the value it provided to each separate unit. Defendants' argument is without merit.

At the time plaintiff contracted with Jo-Rah, no construction had been performed on the condominium complex. Plaintiff was hired to prepare the land for development, and plaintiff provided services such as earth movement, land balancing, and the installing of roads, curbs, and sewers. Although these improvements may have incidentally affected the individual housing units, they were also performed on the common elements of the entire condominium development. Defendants are correct that at least a portion of the work plaintiff performed was on "limited common elements" and "condominium units" such that, under other circumstances, MCL 570.1126(1)(a) would apply.

But, as noted above, the CLA uses the definitions from the Condominium Act. MCL 570.1126(2). MCL 559.103(7) of the Condominium Act defines "common elements" as "the portions of the condominium project other than the condominium units." MCL 559.104(3) defines "condominium unit" as "that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for residential, office, industrial, business, recreational, use as a time-share unit, or any other type of use." MCL 559.106(5) defines "general common elements" as "the common elements other than the limited common elements." MCL 559.107(2) of the act defines "limited common elements" as "a portion of the common elements reserved in the master deed for the exclusive use of less than all of the co-owners." Thus, in a "site" condominium project, such as in the instant case, "condominium unit" and "limited common elements" refer to the residence and surrounding land, "designated and intended for separate ownership and use" or reserved for the "exclusive use" of the owner of the site. See *Williams v City of Troy*, 269 Mich App 670, 673 n 8; 713 NW2d 805 (2005).

However, the language in MCL 570.1126(1)(a) contains the above-emphasized caveat, "[e]xcept as otherwise provided in this Section[.]" It is effectively subordinate to MCL 570.1126(1)(b). And this latter subsection clearly applies. The work was done for improvements authorized by the developer on common elements of the complex such as the land and supporting infrastructure. MCL 570.1126(1)(b) does not limit the lien that may be imposed under this section to the "general common elements" or exclude "limited common elements" as defendants suggest. Had the Legislature wished to do so, it easily could have done so given the separate definitions contained in the Condominium Act. MCL 570.1126(1)(b) applies to the work completed by plaintiff. And, under MCL 570.1126(1)(b), plaintiff's construction lien was limited to those condominium units owned by Jo-Rah at the time plaintiff recorded its lien. Plaintiff recorded its lien on December 28, 2006. At this time, Jo-Rah owned 32 condominium units. Plaintiff properly recorded its lien against only those units, which included Unit 23.

Nevertheless, defendants contend that apportionment is still required under MCL 570.1126(1)(b). Defendants' argument, however, is unpersuasive. On its face, MCL 570.1126(1)(b) is clear. MCL 570.1126(1)(b) is a limitation on construction liens arising under the CLA for improvements furnished to the common elements of a condominium project. MCL 570.1126(1)(b) limits a construction lien for improvements performed upon the common elements to only those units owned by the developer at the time the contractor records its lien. The lien attaches to all those units, and nothing in the statute provides that the lien is to be apportioned among the individual units. Apportionment is not required under the plain language of MCL 570.1126(1)(b).[2]

[2] In contrast, MCL 570.1126(1)(c) provides that "[a] construction lien for an improvement authorized by the association of coowners of condominium units shall attach to each condominium unit only to the proportional extent that the coowner of the condominium unit is required to contribute to the expenses of administration, as provided by the condominium documents." The use of the word "proportional" in MCL 570.1126(1)(c) indicates that the legislature knew how to ensure that a construction lien is apportioned among several

Additionally, MCL 570.1126(1)(b) must be read in context with the rest of the statute. MCL 570.1126(1) provides general limitations on construction liens on condominium units. MCL 570.1126(1)(a) is clear that a lien for work specifically provided separately to individual units or limited common elements understandably attaches only to the unit work was furnished to. MCL 570.1126(1)(b), however, gives the contractor a much broader lien because the work is not furnished to individual units; rather, it is furnished on behalf of multiple units and is not readily severable. Therefore, the lien attaches more broadly and apportionment should not be required. Apportionment would require putting a value on the improvements furnished to each unit, which may not be or cannot be easily ascertained. This rationale is equally applicable to cases where the contractor performs work on or on behalf of multiple "limited common elements" simultaneously such as grading all of the land, or running the sewer lines.

Finally, statutory language should be construed reasonably, keeping in mind the purpose of the act. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). The purpose of the CLA is "to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs." *Vugterveen Sys v Olde Millpond Corp*, 454 Mich 119, 121, 560 NW2d 43 (1997). And the act should be "liberally construed to effectuate these purposes." *Id*. In this case, interpreting MCL 570.1126(b) to require apportionment would go against the purpose of the CLA. There is no question that plaintiff had the right to foreclose on any or all 32 units before defendants purchased Unit 23 and that plaintiff could have satisfied its lien through the sale of any or all of the properties. This is supported by MCL 570.1121(1). MCL 570.1121(1) states in pertinent part:

> If the court finds that a lien claimant is entitled to a construction lien upon the real property to which he or she furnished an improvement, and the amount adjudged to be due has not been paid, the court may enter a judgment ordering the sale of any interest in the real property, or a part of the real property, to which the construction lien attaches.

Therefore, before the sale of Unit 23 to the Brauzes, the trial court could have ordered the sale of any of the units to which plaintiff's construction lien attached until the lien was paid in full. The subsequent sale of Unit 23 to the Brauzes should not and does not change this. Plaintiff can sell any or all the condos its lien attaches to in order to satisfy its lien.[3]

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condominium units. The absence of similar language in MCL 570.1126(1)(b) indicates that the legislature did not intend liens arising under that section to be apportioned amongst the units that it covered.

[3] Additionally, defendants' reliance on cases from other jurisdictions is not justified because we are not bound by out-of-state decisions, and the majority of the cases are either factually or legally distinguishable. The most analogous case defendants cited is *WH Dail Plumbing, Inc v Roger Baker & Assoc, Inc*, 308 SE2d 452 (NC App, 1983). In that case, the plaintiff entered into a contract to provide all the plumbing work for a condominium complex. *Id.* at 452. The plaintiff "installed a sewage system, a roof drainage system, a water cooler, service sinks and a water heating system that would serve all the units of the project." *Id.* The developer then conveyed one unit to the Fishers, who properly recorded their deed. *Id.* The plaintiff then filed a

Although defendants argue that apportionment is the only equitable result in this case, it is well established that equity "cannot be used to avoid the dictates of a statute, absent fraud, accident, or mistake." *Burkhardt v Bailey*, 260 Mich App 636, 659; 680 NW2d 453 (2004). Here, there are no allegations of fraud, accident, or mistake. Apportionment is not required under MCL 570.1126(1)(b), and the trial court did not err in entering a foreclosure judgment against defendants for the entire amount of the lien.

III. ELECTION OF REMEDIES

Defendants also argue that the trial court erred in allowing plaintiff to seek any additional remedy after it already obtained a judgment of foreclosure from Jo-Rah. We disagree. "An action to enforce a construction lien through foreclosure is equitable in nature." MCL 570.118(1). In a case such this one, where the trial court makes findings of fact based on a settled record, and the court does not see or hear witnesses, this Court is not bound by the clearly erroneous standard and instead reviews the record de novo. *Vergote*, 158 Mich App at 106.

The doctrine of election of remedies is generally described as a "procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both. Its purpose is not to prevent recourse to alternative remedies, but to prevent double redress for a single injury." *Riverview Cooperative, Inc v First Nat'l Bank & Trust Co*, 417 Mich 307, 311-312; 337 NW2d 225 (1983) (internal citation omitted). In order for the doctrine to apply three prerequisites must be met. *Id.* at 312. '"Stated briefly, *the essential conditions or elements of election of remedies are*: (1) *The existence of two or more remedies*; (2) *the inconsistency*

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blanket mechanics lien over all the units, including the Fishers', and tried to have the entire amount enforced against the Fishers after the developer filed for bankruptcy. *Id.* The North Carolina Court of Appeals stated:

> It would be grossly inequitable to allow a blanket lien holder to enforce the entire lien against one unit of a multi-unit condominium project. Each unit shall be liable only for its proportionate share based upon the materials and labor furnished to that unit, and its proportionate part of labor and materials furnished the common area, under the contract that is the subject of the lien. [*Id.* at 454.]

Although *WH Dail Plumbing, Inc*, 308 SE2d 452, does lend support for defendants' argument, it is not binding on this Court. Moreover, it is factually distinguishable from the present case. In *WH Dail Plumbing, Inc*, the plaintiff did not file its blanket lien over all the units until after the Fishers had purchased a unit and recorded their interest. The Fishers were not on notice of the plaintiff's interest when they bought the unit. In this case, however, defendants had actual notice of plaintiff's lien. Therefore, while there is some question here as to whether another party should be responsible for giving poor advice to Brauzes and informing them that the escrow would be sufficient absent an agreement with plaintiff, the inequities of enforcing the lien are not the same. There is no evidence that plaintiff was at fault for the misinformation. Additionally, the result in this case must be dictated by the CLA. If the CLA would have been applied to *WH Dail Plumbing, Inc*, the plaintiff's lien would not have attached to the Fishers' unit because the developer no longer owned the unit at the time the plaintiff recorded its lien. MCL 570.1126(1)(b).

between such remedies; and (3) *a choice of one of them.* If any one of these elements is absent, the result of preclusion does not follow.'" *Id.* at 313, quoting *Ielmini v Bessemer National Bank*, 298 Mich 59, 67; 298 NW 404 (1941), quoting 18 Am Jur, Election of Remedies, § 9, pp 132-133) (emphasis in original). The test for inconsistency was articulated in *Prod Finishing Corp v Shields*, 158 Mich App 479, 494-495; 405 NW2d 171 (1987):

> "For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other. [*Id.*, quoting 25 Am Jur 2d, Election of Remedies, § 11.]

Defendants argue that plaintiff's foreclosure action against Unit 23 was precluded because plaintiff elected its remedy by entering into a consent judgment with Jo-Rah for the foreclosure of the 31 units Jo-Rah owned. Defendants' argument, however, is meritless because plaintiff did not seek inconsistent remedies and has not obtained double redress for its injuries. Plaintiff filed an action for foreclosure against all 32 units. That remedy was consistent against all parties. Thus, election of remedies does not apply.

Next, defendants argue that plaintiff's foreclosure against Unit 23 was barred because its lien was discharged by the consent judgment of foreclosure against the 31 other units. Defendants cite *Dunitz v Woodford Apartments Co*, 236 Mich 45; 209 NW 809 (1926), and *Highland Lakes Country Club & Community Ass'n v Franzino*, 892 A2d 646 (NJ, 2006), for the general principle that a foreclosure extinguishes the lien and the property no longer secures the debt. To this end, defendants are correct. As a general rule, the foreclosure of a lien extinguishes the lien. *Dunitz*, 236 Mich at 49. However, as plaintiff correctly points out, there is a difference between a judgment of foreclosure and an actual foreclosure.

Plaintiff received a consent judgment of foreclosure against the 31 units owned by Jo-Rah, but plaintiff has not actually foreclosed and sold the property to satisfy its lien. Under the CLA, a lien is not extinguished until the property is sold and the trial court certifies the sale. MCL 570.1121(4) and (6). There is no basis for finding that the still unsatisfied consent judgment alone extinguished plaintiff's lien on Unit 23. If plaintiff had sold the 31units owned by Jo-Rah and satisfied its lien before to the judgment complained of, there would be no question that the lien against Unit 23 would have been extinguished. Once plaintiff's debt is paid, it is no longer entitled to a lien on any of the property. Likewise, if plaintiff had sold the 31 units Jo-Rah owned and did not satisfy the full value of its lien, its lien against Unit 23 would still be valid for the remaining amount. Although defendants try to characterize this as "a second bite at the foreclosure apple," this is a mischaracterization. Until plaintiff's lien was satisfied, or all the property had been foreclosed upon, plaintiff's lien was still enforceable. Thus, at the time of the judgment, the lien had not yet been discharged, and defendants' argument on this point is without merit.

IV. AMENDMENT OF THE DEFENSES/EQUITABLE SUBROGATION

Defendants complain that the trial court erred in refusing to grant their motion to amend their defenses. We disagree. A trial court's decision denying a motion to amend under MCR 2.116(I)(5) is reviewed for an abuse of discretion and will be only reverse "if it occasions an injustice." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 719; ___ NW2d ___ (2010). An abuse of discretion occurs when the trial court chooses an outcome that does not fall within the range of reasonable and principled outcomes. *Id*. at 718.

Under MCR 2.118(A)(2), "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Generally, a court should freely grant a motion to amend and leave should only be denied for particularized reasons, such as futility, undue delay, bad faith, and undue prejudice. *Boylan*, 289 Mich App at 718.

Defendants argue that the trial court abused its discretion when it denied their request to amend their pleading to add the affirmative defense of equitable subrogation. Plaintiff, however, contends that the trial court did not abuse its discretion because amendment would have been prejudicial. Plaintiff asserts that had it been made aware of this defense earlier, it would not have stipulated to dismissing Republic Bank from the litigation. Although plaintiff's argument is compelling, review of this issue is complicated because the trial court gave no explanation for its decision denying defendants' motion to amend its affirmative defenses. If the trial court denies a motion to amend, it must specifically state the reasons for its decision on the record "and the failure to do so requires reversal unless the amendment would be futile." *PT Today, Inc v Comm'r of Office of Financial & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

Therefore, the question for this Court when reviewing the decision denying the motion to amend is whether amendment would be futile. "An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *Id*. Points two and three are not applicable here, so the question is whether, ignoring the substantive merits of the claim, it is legally insufficient on its face.

Although defendants argued below that Citizens Bank is entitled to Republic Bank's priority via equitable subrogation, defendants had earlier conceded that plaintiff's construction lien had priority over Citizens Bank's mortgage on Unit 23. In defendants' answer to plaintiff's interrogatories, defendants conceded that plaintiff's construction lien had priority. Because defendants admitted that plaintiff's construction lien had priority over Citizens' mortgage, defendants are estopped from arguing that Citizens Bank is now entitled to Republic Bank's priority through equitable subrogation.

> Equitable estoppel arises where [(1)] a party by representations, admissions, or silence intentionally or negligently induces another party to believe facts, [(2)] the other party justifiably relies and acts on this belief, and [(3)] the other party will be prejudiced if the first party is permitted to deny the existence of those facts. [*Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999).]

In this case, defendants' answer to plaintiff's interrogatory induced plaintiff to believe that, as to Citizens Bank, the priority of its lien was not an issue in the case, and plaintiff justifiably relied

on that when it stipulated to Republic Bank's dismissal from the action. As a result, any amendment would have been futile as defendants are estopped from claiming equitable subrogation. The trial court did not err in denying their motion to amend.

V. INTEREST

Defendants argue that the trial court erred in granting plaintiff interest on its construction lien pursuant to the CLA. We disagree. The construction of a statute is a question of law, which we review de novo. *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

Defendants argue that interest was not allowed on plaintiff's construction lien under *Brede v Ross*, 236 Mich 651; 211 NW2d 58 (1926). In *Brede*, our Supreme Court disallowed the inclusion of overhead and profits from the plaintiff's mechanics lien because the overhead and profits were not part of the value of the work done and material provided. *Id.* at 654. Defendants argue that under *Brede*, interest is likewise barred from plaintiff's construction lien. This argument, however, is unpersuasive.

In *Erb Lumber Co v Homeowner Constr Lien Recovery Fund*, 206 Mich App 716, 722; 522 NW2d 917 (1994), this Court held that the plaintiff was "entitled to seek a lien which included a sum representing the time-price differential" under the CLA. The defendant argued that the plaintiff's time-price differential charge was precluded under *Brede*. *Id.* at 720-721. This Court, however, looked at MCL 570.1107(1) which states in part: "[a] construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract." *Erb Lumber*, 206 Mich App at 719. Therefore, the Court determined that the proper inquiry was whether the time-price differential was part of the contract. *Id.* at 720. In so doing, this Court distinguished *Brede*. This Court recognized that in *Brede* the plaintiff's recovery was limited by the theory of recovery that it asserted: quantum meruit. *Id.* at 721. This Court stated:

> The [Supreme] Court . . . suggested that, had plaintiff proceeded on a contract theory, he would have been entitled to recover a portion of the overhead and profit. However, as plaintiff had sued under a quantum meruit theory, he was entitled to recover only for the value of the work done and materials furnished up to the time of the breach.
>
> In contrast to the plaintiff in *Brede,* plaintiff here relies on the terms of the contract to establish its costs. By including a time-price differential, plaintiff essentially set differing costs for the materials depending on when they were paid for after delivery. Following *Brede*, since the contract terms established the cost of the materials, and profit and overhead were included, plaintiff is entitled to recover the time-price differential as well. Furthermore, the statute here clearly contemplates that recovery is based on the value of the contract less amounts already paid. [*Id.*]

Therefore, under the reasoning in *Erb Lumber*, plaintiff's construction lien may properly include the charge of interest. Although defendants argue that the distinction in *Erb Lumber* was

that the plaintiff was seeking the inclusion of a time-price differential, that argument is incorrect. As the quoted passage clearly demonstrates, the distinction drawn in *Erb Lumber* was based on the CLA and the theory of recovery. The essential question was whether the time-price differential was included in the contract price. In this case, the contract provided, "All payments are due within 10 days after invoice or 1½ percent per month." In *Erb Lumber* the contract provided for a two percent charge per month if payment was not made within 150 days of delivery. *Id.* at 717. There exists no practical difference between the "interest" charged in this case and the "time-price differential" in *Erb Lumber*. Even under MCL 570.1107(7) a construction lien may "include an amount for interest, including, but not limited to, a time-price differential or a finance charge . . . ." The trial court did not err in awarding plaintiff interest on its construction lien.

VI. SWORN STATEMENT

Defendant's final argument on appeal is that the trial court erred in allowing plaintiff to proceed even though plaintiff failed to provide a sworn statement to defendants. We need not reach this issue because it was waived. Defendants raised the issue of the lack of sworn statement in their affirmative defenses. Defendants also raised the issue in their supplemental trial brief. However, on the date set for trial, plaintiff and defendants informed the trial court that there were no factual issues, but that there were three legal issues. An affirmative defense, such as lack of a sworn statement, may be waived, and such waiver may "be shown by a course of acts and conduct, and in some cases will be implied therefrom." *Burton v Reed City Hosp Corp*, 471 Mich 745, 755 n 4; 691 NW2d 424 (2005) (quotation marks omitted). Because defendants stipulated that no factual issues existed and agreed to limit the legal issues to apportionment, election of remedies and interest, defendants waived the defense, and the issue is not perserved for appeal. A party cannot stipulate to a matter at the trial court and then argue that the resultant action was in error. *Holmes v Holmes*, 281 Mich App 575, 588; 760 NW2d 300 (2008). Therefore, defendants waived this issue for appeal, and we need not address it.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly