STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY HARRELL BUILDER, INC.,

Plaintiff-Appellee,

v

CHRISTOPHER WOLFF, PAMELA WOLFF, MMS MORTGAGE SERVICES, DEPARTMENT OF ENERGY LABOR AND ECONOMIC GROWTH, and HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND,

Defendants,

and

FULTON CONSTRUCTION COMPANY, INC.,

Defendant-Appellant.

UNPUBLISHED
November 29, 2011

No. 299270
Oakland Circuit Court
LC No. 2009-103886-CH

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Defendant Fulton Construction Company, Inc., appeals the trial court's order that awarded defendant its $20 motion fee as the prevailing party but otherwise denied defendant's motion for costs and attorney fees. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

In May 2006, plaintiffs Christopher Wolff and Pamela Wolff hired defendant to construct a log home on their property. In October 2007, the Wolffs terminated defendant as general contractor; plaintiffs did not pay for the work defendant performed up to that date, and defendant recorded a claim of lien against the Wolffs' property on January 15, 2008. On January 12, 2009, defendant filed suit against the Wolffs to foreclose on the construction lien and for related contractual and equitable claims. Defendant also recorded a notice of lis pendens against the Wolffs' property.

The Wolffs hired plaintiff to complete the construction. The contract plaintiff signed with the Wolffs was in the name of Jeff G. Harrell Builder, Inc., a recognized business and a

licensed builder in Michigan. Throughout its interactions with the Wolffs, plaintiff used stationary reading H B Harrell Building Co., Jeff Harrell Building Co., and Harrell Building Co., and cited Jeffrey G. Harrell Builder Inc. as the licensed builder on the project. The Wolffs failed to pay plaintiff for the work performed on the project; plaintiff recorded a claim of lien against the Wolffs' property in the name of Harrell Building Company. Harrell Building Company is neither a recognized business nor a licensed builder in Michigan.

On July 16, 2009, plaintiff filed suit in the name of Harrell Building Company seeking to foreclose on the claim of lien recorded against the Wolffs' property. Plaintiff named defendant as a party based on defendant's recorded claim of lien against the same property. Defendant moved to dismiss on the ground that Harrell Building Company was neither a recognized business nor a licensed builder in Michigan, and as such was barred from using the Construction Lien Act (CLA), MCL 570.1101 *et seq*., to recover for improvements to real property. Prior to the hearing on defendant's motion, the suit was dismissed with prejudice by stipulation of the parties on October 9, 2009.

Plaintiff filed a second suit, this time under the name Jeffrey G. Harrell Builder Inc., seeking to foreclose on the claim of lien recorded under the name Harrell Building Company against the Wolffs' property. Defendant was named as a party in this suit as well. Defendant moved to dismiss, arguing that Jeffrey G. Harrell Builder Inc., had not recorded a claim of lien. The trial court granted defendant's motion for summary disposition and dismissed the claims against defendant.

Defendant moved for costs and reasonable attorney fees, seeking costs and fees in the amount of $6,289.41 on the ground that plaintiff's lawsuit was frivolous. The trial court awarded defendant $20 for its motion fee as the prevailing party, but denied all other costs and attorney fees.

II. DISCUSSION

A. RULING THAT LAWSUIT IS NOT FRIVOLOUS

Defendant argues that the trial court clearly erred when it ruled that plaintiff's suit is not frivolous. "A trial court's finding that an action is frivolous is reviewed for clear error." *Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 168; 712 NW2d 731 (2005). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Attorney Fees and Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

Under MCL 600.2591(3)(a), a lawsuit is frivolous if at least one of the following conditions is met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

Defendant argues that plaintiff's action was frivolous because the construction lien was not in plaintiff's name or in the name of a licensed builder as required by statute. In the trial court, plaintiff argued that the construction lien was recorded in the name of Harrell Building Company as a good faith mistake and that Harrell Building Company was really plaintiff, a licensed builder. Plaintiff argued that he had substantially complied with the requirements of the CLA and was entitled to foreclose upon the lien.

MCL 570.1302 provides in pertinent part:

> (1) This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

Defendant relies on several cases in which alter-ego defenses were rejected by the court when construing the validity of a construction lien. Defendant asserts that these cases establish that substantial compliance does not extend to protect unlicensed builders, and that plaintiff's complaint was devoid of arguable legal merit. However, these cases are distinguishable from this case. In *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002), the builder recorded a construction lien under the proper name but was not a licensed builder; here, plaintiff recorded under the wrong name, but was in fact a licensed builder. In *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc*, 461 Mich 316; 603 NW2d 247 (1999), the builder did not record a construction lien in a timely fashion; here, plaintiff recorded a lien on time, but under the wrong name. In *Annex Constr, Inc v Fenech*, 191 Mich App 219; 477 NW2d 103 (1991), a construction lien was filed under the name of Annex Construction, an unlicensed residential builder whose president and sole shareholder was a licensed builder; here, plaintiff is not arguing that Jeffrey G. Harrell Builder Inc.'s license should extend to a separate entity, but rather that Jeffrey G. Harrell Builder Inc. and Harrell Building Company are the same entity. Finally, in *H A Smith Lumber & Hardware Co v Decina*, 258 Mich App 419; 670 NW2d 729 (2003), rev'd in part on other grounds 480 Mich 987 (2007), the building company was not licensed, and as in *Annex Construction*, the court declined to extend the license of a president and sole shareholder to the company at large.

We hold that while plaintiff's argument of good faith mistake and substantial compliance ultimately may have been unlikely to succeed, the trial court did not clearly err by finding that plaintiff's complaint was not frivolous. Moreover, plaintiff might well have made a good-faith argument for the extension of existing law by asserting that because the entity Jeffrey Harrell Builder, Inc. was a licensed builder and Harrell Building Company was an (unofficial) assumed name for Jeffrey Harrell Builder, Inc., plaintiff substantially complied with the licensing requirements. MCR 2.114(D)(2). That such an argument may have been unlikely to succeed does not mandate a conclusion that it was frivolous. It was not clear error for the trial court to decline to find that plaintiff's action was frivolous.

B. COSTS

Defendant argues that the trial court erred when it denied defendant costs under the CLA. We review a question of statutory interpretation de novo. *Department of Treasury v Gilling*, 289 Mich App 219, 228; 796 NW2d 476 (2010).

MCL 570.1114a provides in pertinent part:

> (1) 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.
>
> (2) 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.

"A civil action is commenced by filing a complaint with a court." MCR 2.101(B). Here, defendant did not bring an action to discharge a construction lien recorded by an unlicensed builder. Rather, defendant filed a motion to dismiss against a party attempting to foreclose on a construction lien recorded by an unlicensed builder. The statutory language is clear and unambiguous in its limitation of the awarding of actual costs and attorney fees to the person who brings an action to discharge a construction lien recorded by an unlicensed builder. The trial court did not err by denying defendant costs under the CLA.

Defendant further contends that the trial court erred in holding that defendant was entitled only to an award of $20 as reimbursement of its motion filing fee. "This Court reviews for an abuse of discretion a trial court's decision on a motion for costs under MCR 2.625." *Mason v Menominee*, 282 Mich App 525, 530; 766 NW2d 888 (2009). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id*.

"Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1). A party is considered a prevailing party in an action with several defendants if "judgment for or dismissal of one or more of them is entered." MCR 2.625(B)(3).

However, "The general 'American rule' is that 'attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary.'" *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004), quoting *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). "As such, the term 'costs' ordinarily does not encompass attorney fees unless the statute or court rule specifically defines 'costs' as including attorney fees." *Id*.

Defendant requested its $20 motion filing fee, mileage costs of $213, attorney time for attending hearings in the amount of $1,155, plus actual costs and attorney fees expended in the case. Other than the filing fee, it appears that the costs requested by defendant fall under the umbrella of attorney fees. Nowhere in MCR 2.625 is the term "cost" defined to include attorney fees, and defendant is not entitled to attorney fees under the CLA. Because defendant is not entitled to attorney fees, the trial court did not err in holding that defendant is only entitled to an award of $20 for reimbursement of its motion filing fee.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell