

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

KENNETH MELAMPY, :
 :
Plaintiff-Appellee, : CASE NO. CA2011-03-045
 :
- vs - : OPINION
 : 2/21/2012
EVANS LANDSCAPING, INC., et al., :
 :
Defendants-Appellants. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-03-0964

Jeff J. Cornwell, 7182 Liberty Centre Drive, Suite N, West Chester, Ohio 45069, for plaintiff-appellee

Anthony J. Muto, 4229 Roundbottom Road, Cincinnati, Ohio 45244, for defendants-appellants, Evans Landscaping, Inc. and Douglas L. Evans

Timothy R. Evans, 29 North D Street, P.O. Box 687, Hamilton, Ohio 45013, for defendants-appellants, Evans Landscaping, Inc. and Douglas L. Evans

HENDRICKSON, P.J.

{¶ 1} Defendants-appellants, Evans Landscaping, Inc. and Douglas L. Evans (collectively referred to as "Evans"), appeal from a Butler County Court of Common Pleas decision awarding attorney fees to plaintiff-appellee, Kenneth Melampy. For the reasons outlined below, we affirm the trial court's decision.

{¶ 2} Melampy entered into a home construction contract with a contractor ("original contractor") to have landscaping stone work performed at his residence. To complete the contract, the original contractor ordered stone from Evans, a material supplier, who delivered the stone directly to Melampy's home.

{¶ 3} Evans claims Melampy never paid for the stone it provided. In order to be availed of the rights of a lienholder, Evans filed an affidavit of mechanics' lien against Melampy's residence with the recorder's office at the end of September 2009. For reasons not clearly established below, Evans released the lien approximately one month later. However, near the end of November 2009, Evans filed a second affidavit of mechanics' lien against Melampy's property regarding the exact same materials covered by the first lien.

{¶ 4} At some point in time, Melampy received an affidavit ("paid in full affidavit") dated August 21, 2009, from the original contractor.¹ This paid in full affidavit stated that Melampy had paid the original contractor in full for the entire home construction contract, including the total amount owed to Evans for the stone material. The parties stipulated at trial that Melampy had provided Evans with written notice that Melampy paid the original contractor in full prior to Melampy receiving a copy of Evans' affidavit of mechanics' lien. It is undisputed that Evans received a copy of the paid in full affidavit and that the paid in full affidavit was never filed with the county recorder's office.

{¶ 5} Despite receipt of the paid in full affidavit from Melampy, Evans failed to release its second mechanics' lien. Due to the lien filed against his property, Melampy testified that he was unable to complete the process of refinancing his home.

{¶ 6} Melampy filed suit against Evans asserting several causes of action relating to its failure to release the lien. Prior to trial, all claims were dismissed with prejudice except

1. From the record it is unclear whether Evans had received a copy of Melampy's paid in full affidavit before Evans released the first mechanics' lien.

for Melampy's claim that Evans violated R.C. 1311.011 by failing to timely release the lien after receiving proper written notice that Melampy had paid the original contractor in full for the project. Following a bench trial, the trial court found Evans in violation of R.C. 1311.011(B)(3) and awarded Melampy compensatory damages and attorney fees incurred as a result of the litigation.

{¶ 7} Evans now appeals, raising one assignment of error for review.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED IN THE AWARDING OF ATTORNEY'S [sic] FEES TO THE APPELLEE UNDER OHIO REVISED CODE SECTION 1311.011(B)(3), TO THE PREJUDICE OF THE DEFENDANTS-APPELLANTS.

{¶ 10} We find that this is a case of first impression since R.C. 1311.011(B)(3) was amended in 2007 to include the award of court costs and reasonable attorney fees as permissible damages. We conclude that a homeowner may recover attorney fees regardless of whether a paid in full affidavit was recorded in the county recorder's office.

{¶ 11} Every person who furnishes material to an original contractor in carrying out any improvement has a lien to secure payment for the materials against the said improvement and all interest the owner may have or subsequently acquire in the property. R.C. 1311.02. In order to perfect this lien, the material supplier must record an affidavit of mechanics' lien within 60 days from the last day that the material was furnished. R.C. 1311.06. The law requires that the lienholder then serve a copy of the affidavit on the owner within 30 days of filing it with the county recorder. R.C. 1311.07.

{¶ 12} In 1977, the General Assembly enacted R.C. 1311.011, which limits the scope of a lien under R.C. 1311.02 and is commonly known as part of the "Home Owner's Amendment." *Buy-Rite Lumber Co. v. Discenza*, 8th Dist. Nos. 63745, 63753, 63757, and 63758, 1992 WL 369242, *2 (Dec. 10, 1992). Subsequently in 2007, the General Assembly

amended R.C. 1311.011 to its current version, which places conditions on when a material supplier may place a lien on a homeowner's property. R.C. 1311.011(B)(1) sets forth one such condition and provides that a material supplier cannot place a lien on a homeowner's property to secure payment where (1) the homeowner has paid the original contractor in full and (2) said full payment to the original contractor was made prior to the homeowner's receipt of a copy of the affidavit of mechanics' lien pursuant to R.C. 1311.07. Where these requirements are met and a material supplier proceeds to file an affidavit of mechanics' lien, the homeowner is entitled to seek damages pursuant to R.C. 1311.011(B)(3).

{¶ 13} According to R.C. 1311.011(B)(3), a lienholder is liable to the homeowner for "all damages" for failing to release a lien if (1) the lien claimant receives written notice that the homeowner made full payment to the original contractor prior to the homeowner's receipt of a copy of the mechanics' lien affidavit pursuant to R.C. 1311.07 and (2) the lienholder then fails to release the lien within 30 days of receiving the homeowner's written notice. Pursuant to the General Assembly's 2007 amendment to the section, a homeowner is entitled to seek damages which include "court costs and reasonable attorney fees incurred during any litigation between the owner and a lien claimant or lien claimants who have refused to release their liens after receiving a copy of the affidavit referred to in division (B)(1) of this section[.]"

{¶ 14} The statute, therefore, requires the lienholder to receive a copy of the affidavit meeting the requirements set forth in R.C. 1311.011(B)(1) in order for the homeowner to be entitled to recover attorney fees incurred during litigation between the parties. As mentioned above, the very narrow issue we are faced with in this case is whether the affidavit referred to in division (B)(1) is required to be recorded in order for the homeowner to recover attorney

fees under division (B)(3).²

{¶ 15} R.C. 1311.011(B)(1) makes reference to the recording of an affidavit as follows: "An owner * * * may file with the county recorder of the county in which the property that is the subject of a home construction contract * * * is situated an affidavit that the owner * * * has made payment in accordance with this division."

{¶ 16} Evans contends that it is not liable for attorney fees because the plain language of R.C. 1311.011 requires the affidavit under division (B)(1) to be filed with the county recorder, which did not happen in the case at bar. Evans further contends that the statute as a whole clearly and unambiguously supports this position.

{¶ 17} Statutory interpretation is a matter of law, and therefore requires de novo review. *State v. Niesen-Pennycuff*, 12th Dist. No. CA2010-11-112, 2011-Ohio-2704, ¶ 6. We look to the plain language of the statute to determine the intent of the General Assembly. *State v. Hause*, 12th Dist. No. CA2008-05-063, 2009-Ohio-548, ¶ 13, citing *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 1997-Ohio-310. A court does not need to interpret a statute "when statutory language is plain and unambiguous and conveys a clear and definite meaning." *Niesen-Pennycuff* at ¶ 12, quoting *Campbell v. City of Carlisle*, 127 Ohio St.3d 275, 2010-Ohio-5707, ¶ 8. When the meaning of the statute is "clear and unambiguous," the statute is to be applied "as written." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶ 20.

{¶ 18} As noted in *Niesen-Pennycuff* at ¶ 16, quoting *Boley* at ¶ 20-21, the role of this court in statutory interpretation

is to evaluate a statute as a whole and give such interpretation as will give effect to every word and clause in it. No part should

2. The parties have either stipulated to or waived all other statutory requirements under Chapter 1311 of the Ohio Revised Code (regarding the content of written notices or affidavits, timeliness of service of written notices or affidavits, etc.) except for the determination of whether the homeowner's paid in full affidavit under R.C. 1311.011(B)(1) is required to be filed with the county recorder.

be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. [S]tatutes may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.

{¶ 19} We find that the statutory language "may file with the county recorder * * * an affidavit that the owner * * * has made payment in accordance with this division" is plain and unambiguous and provides a clear and definite meaning that recording the affidavit is discretionary and not mandatory.³ The plain language of R.C. 1311.011(B)(1) does not *require* the affidavit to be filed with the county recorder as evidenced by the verb "may." See *Niesen-Pennycuff* (holding that the General Assembly's use of the word "may" allows for discretion). If the General Assembly intended the recording of the affidavit referred to in division (B)(1) to be mandatory, it could have easily inserted the word "shall" instead of "may." This would have been consistent with the recording requirement of an affidavit for a mechanics' lien under R.C. 1311.06, which states that a person seeking a mechanics' lien against a parcel of property "*shall* make and file for record in the office of the county recorder in the counties in which the improved property is located" an affidavit setting forth certain specified information. (Emphasis added.)

{¶ 20} In the alternative, the General Assembly could have inserted the word "recorded" to describe the type of affidavit required under division (B)(3) if it intended to require the homeowner's affidavit be recorded.⁴ Thus, it is readily apparent from the plain language of the statute in question that the paid in full affidavit is not required to be recorded in order for the owner to be entitled to an award of court costs and reasonable attorney fees

3. The phrase "made payment in accordance with this division" merely refers to the owner having made full payment to the original contractor and that this payment was made prior to the owner receiving a copy of the mechanics' lien affidavit.

4. The General Assembly could have stated "a copy of the *recorded* affidavit referred to in division (B)(1) of this section."

under division (B)(3).

{¶ 21} Even if we determined the plain language of the statute is not clear and definite, the legislative intent still supports our finding that the affidavit referred to in division (B)(1) is not required to be recorded before an owner may be awarded court costs and reasonable attorney fees under division (B)(3). First, in considering the purpose of the enactment of R.C. 1311.011, it is apparent that the intent behind R.C. 1311.011 is to protect the homeowner. As the appellate court noted in *Brown-Graves Co. v. Obert*, 98 Ohio App.3d 517 (9th Dist.1994):

The Home Owners Amendment was enacted to "prevent the owner of a single or double family dwelling who is a party to a home purchase contract from being required to pay more than the amount due the general contractor where the general contractor has not paid a subcontractor, materialman or laborer." *Universal Drywall, Inc. v. Eads* (Oct 6, 1981), Franklin App. No. 81AP-232, unreported, 1981 WL 3502. In other words, the amendment protects a homeowner, who has not received an affidavit of mechanics' lien, from having to pay both a general contractor-builder and a subcontractor for the same services. Instead of protecting subcontractors and materialman at the risk of double payment by homeowners, the amendment requires subcontractors and materialman to obtain payment for the services which they have rendered from the general contractor-builder to the extent that the homeowner has paid the general contractor-builder for such services. *Id.* at 521.

{¶ 22} Secondly, R.C. 1311.22 provides that R.C. 1311.01 to 1311.22 are to be liberally construed to "secure the beneficial results, intents, and purposes thereof." Since the clear purpose of R.C. 1311.011 is to protect the homeowner, we must liberally construe the language contained in both R.C. 1311.011(B)(3) and 1311.011(B)(1) in favor of the homeowner. In doing so, we find that the homeowner's paid in full affidavit set forth in division (B)(1) of this statute does not have to be recorded in order for a homeowner to be awarded reasonable attorney fees under division (B)(3).

{¶ 23} Finally, the Legislative Act Summary accompanying the R.C. 1311.011(B)(3)

amendment gives us some guidance in construing the legislative intent of this statute. Prior to the amendment, some courts found that the term "all damages" used by the General Assembly was a general award of damages, and absent specific statutory authority an award of attorney fees was not proper. See *Wilson Concrete Prod., Inc. v. Baughman*, 2nd Dist. No. 20069, 2004-Ohio-4696. In 2007, the General Assembly amended this section by adding a sentence to expressly allow the recovery of court costs and reasonable attorney fees. We note that in the Act Summary released with the amendment there is no mention whatsoever of a recording requirement for the affidavit in order for the homeowner to be awarded attorney fees. 2007 Sub.H.B.No. 487, Act Summary.

{¶ 24} Therefore, based upon the parties' stipulations, the record below, and our determination that the affidavit referred to in division (B)(1) is not required to be recorded, we find that Melampy was properly entitled to an award of attorney fees incurred during litigation over the release of Evans' mechanics' lien. Appellants' single assignment of error is overruled.

{¶ 25} Judgment affirmed.

PIPER and HILDEBRANDT, JJ., concur.

Hildebrandt, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5 (A)(3), Article IV of the Ohio Constitution.