STATE OF MICHIGAN

COURT OF APPEALS

STRUCTURAL ENGINEERING SOLUTIONS, LLC,

Plaintiff/Counter-Defendant-Appellant,

v

VISION DEVELOPMENT PROPERTIES & RENTALS, LLC, JAMES HYSEN, CARROLL STRANGE, KENNETH M. SWEENEY, MICHAEL J. DEMASI, HOLLY L. DEMASI, GERALD J. CADREAU, LAURA K. CADREAU, RICHARD L. ADORYAN, DEBORAH M. ADORYAN, MARTIN P. RYMARZ, LORI L. RYMARZ, ERIK B. ROBINSON, AMY KELLEY, JEFFREY J. NATHAN KELLEY, WILLIAM J. REESE, SUSAN M. REESE, CHRISTOPHER MANNINEN, KIMBERLY MANNINEN, MICHAEL FURLINE, JAMIE L. FURLINE, MICHELLE STEELMAN, MARCUS S. ROYALTY, SANDRA C. ROYALTY, MICHAEL COUCH, MELINDA COUCH, and AMERICA'S WHOLESALE LENDER,

Defendants-Appellees,

and

ECHELON ENTERPRISES, LLC,

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

and

STEVEN KYZIMA

Third-Party Defendant-Appellee.

UNPUBLISHED
November 19, 2009

No. 286492
Genesee Circuit Court
LC No. 06-084562-CH

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Plaintiff Structural Engineering Solutions, LLC filed this action against defendants, including, among others, multiple individual condominium owners, to foreclose on a construction lien and to recover the balance owed for materials supplied to defendant Echelon Enterprises, LLC ("Echelon"), the builder of the condominium development. The trial court granted summary disposition of plaintiff's construction lien claim and dismissed the individual property owners pursuant to MCR 2.116(C)(8), on the ground that plaintiff did not have an enforceable construction lien. The case proceeded to trial against Echelon and its owners, defendants Carroll Strange and James Hysen. Following a bench trial, the trial court determined that Echelon was liable for breach of contract for failing to pay the full amount owed for materials furnished by plaintiff, but that Echelon was also entitled to various credits against the amount owed, resulting in a net judgment for plaintiff of $14,552.98. The court dismissed all remaining claims and counterclaims against all remaining parties. Plaintiff appeals as of right. We affirm.

I. Summary Disposition

Plaintiff first argues that the trial court erred in dismissing its claim against the property owners for foreclosure of its construction lien. Although we agree that summary disposition of this claim was improper under MCR 2.116(C)(8), we conclude that reversal is not required because the property owners also requested summary disposition under MCR 2.116(C)(10) and summary disposition was appropriate under that subrule.[1]

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a plaintiff's complaint by the pleadings alone. *Id*.; *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if a claim is so clearly unenforceable as a matter

[1] To the extent that plaintiff argues, as it did below, that the property owners lack standing to challenge the validity of its lien, we reject that argument for lack of merit. Contrary to what plaintiff argues, it is immaterial that the property owners did not have an interest in their properties at the time plaintiff's construction lien was recorded. Rather, because it is undisputed that the property owners had an interest in the properties at the time plaintiff filed this action for foreclosure of the construction lien, they were required to be joined as parties pursuant to MCL 570.1117(4). See *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 117-123; 667 NW2d 880 (2003). As such, and because their property interests were subject to divestiture or impairment by foreclosure of the lien, the property owners had standing to challenge the validity of that claim.

of law that no factual development could justify recovery. *Spiek*, *supra* at 337. Conversely, a motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact "and the moving party is entitled to judgment as a matter of law." *Babula*, *supra* at 48.

Plaintiff's complaint alleged that it supplied labor and materials for the condominium project between February 2005 and August 1, 2005, and that it was owed $76,136.84 by the builder, Echelon, and the developer, defendant Vision Development Properties & Rentals, L.L.C. ("Vision").[2] Plaintiff alleged that it filed a notice of furnishing on August 18, 2005, and recorded its lien for $70,000 on August 18, 2005. A copy of the lien was served on Vision on August 24, 2005. Plaintiff alleged that it had an enforceable lien under the Construction Lien Act ("CLA"), MCL 570.1101 *et seq.*, and sought to foreclose on that lien.

The property owners moved for summary disposition on the ground that plaintiff did not timely provide a notice of furnishing under MCL 570.1109, which provides, in relevant part:

> (1) Except as otherwise provided in sections 108, 108a, and 301, [MCL 570.1108, 570.1108a, and 570.1301] a subcontractor or supplier who contracts to provide an improvement to real property shall provide a notice of furnishing to the designee and the general contractor, if any, as named in the notice of commencement at the address shown in the notice of commencement, either personally or by certified mail, within 20 days after furnishing the first labor or material. If a designee has not been named in the notice of commencement, or if the designee has died, service shall be made upon the owner or lessee named in the notice of commencement. If service of the notice of furnishing is made by certified mail, service is complete upon mailing. A contractor is not required to provide a notice of furnishing to preserve lien rights arising from his or her contract directly with an owner or lessee.
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> (6) The failure of a lien claimant, to provide a notice of furnishing within the time specified in this section shall not defeat the lien claimant's right to a construction lien for work performed or materials furnished by the lien claimant before the service of the notice of furnishing except to the extent that payments were made by or on behalf of the owner or lessee to the contractor pursuant to either a contractor's sworn statement or a waiver of lien in accordance with this act for work performed or material delivered by the lien claimant. . . .

Thus, under MCL 570.1109(6), a subcontractor's failure to provide a notice of furnishing within the 20-day period does not defeat its right to a lien, but the value of the lien is reduced by any

[2] Plaintiff dismissed its claims against Vision, with prejudice, before trial.

payments made by the owner for the subcontractor's work, if they were made pursuant to a contractor's sworn statement or waiver of lien. *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 122-123; 560 NW2d 43 (1997).

Although the property owners argued that plaintiff did not provide a notice of furnishing to the owner and general contractor until it filed its complaint, plaintiff produced evidence that it provided the notice of furnishing to Vision in August 2005. The property owners did not show that plaintiff was also required to provide the notice of furnishing to Echelon. See MCL 570.1109(1).

The property owners also argued that Vision complied with MCL 570.1109(6) because it made payments to Echelon pursuant to sworn statements and, because plaintiff's contract to supply materials was with Echelon only, and not Vision as the property owner, the lien was not valid. The property owners contended that Vision had fully paid Echelon for the materials that plaintiff supplied, relying on full unconditional waivers of lien signed by plaintiff as proof that Vision had paid in full for the work performed. Plaintiff argues, however, that the waivers of lien were not valid because it signed the waivers in exchange for Echelon's payment by check, which Echelon subsequently stopped payment on.

MCL 570.1109(6) requires that an owner make payment pursuant to a waiver of lien or sworn statement before a lien will be deemed unenforceable. Whether a waiver of lien is valid is generally a question of fact. See *Horton v Verhelle*, 231 Mich App 667, 677; 588 NW2d 144 (1998), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). The burden of proof is on the party seeking to show a valid waiver of lien. *Id*. at 676.

Here, the evidence showed that Echelon stopped payment on the check after it learned that plaintiff had not paid its own supplier, who in turn threatened to place a lien on the development. Echelon then paid the supplier directly so work could continue. We conclude that these circumstances do not affect the validity of the waivers of lien. MCL 570.1115(4) provides that "[a] partial conditional waiver of lien or a full conditional waiver of lien shall be effective upon payment of the amount indicated in the waiver." MCL 570.1115(6) further provides that "[a] waiver of lien under this section shall be effective when a person makes payment relying on the waiver unless at the time payment was made the person making the payment has written notice that the consideration for the waiver has failed." This statute provides the only basis for showing that a waiver of lien is invalid for failure of consideration.

The CLA is remedial in nature and is to be construed liberally to "secure the beneficial results, intents, and purposes of this act." MCL 570.1302(1); *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 373; 652 NW2d 474 (2002). "The act 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." *Id*. at 373-374.

In *Poole-Dickie Lumber Co v Strother*, 60 Mich App 321, 322-323; 230 NW2d 420 (1975), a case decided under the former mechanics lien laws, the plaintiff signed a waiver of lien after receiving a promissory note and a check, each for $3,400, to cover the full amount due of $6,800. The plaintiff later learned that the consideration for the waiver was worthless and tried

to rescind the waiver of lien. *Id*. at 323. This Court held that although the consideration for the waiver failed, the waiver of lien was still valid, explaining:

> The situation that plaintiff finds itself in was created by plaintiff. It is undisputed that plaintiff executed the waiver of lien voluntarily in anticipation of receiving full payment of its account from the proceeds of Bratko's check and promissory note. That these instruments proved to be worthless is unfortunate for plaintiff, but it should not and does not affect the validity of the waiver of lien. As stated in *Pittsburgh Plate Glass Co v Art Centre Apartments*, 253 Mich 501, 506-507; 235 NW 234, 235 (1931):
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> "but carelessness or inadvertence on the part of one executing a written instrument does not justify courts in decreeing its nullification in whole or in part. * * * If once waived, a mechanic's lien cannot be revived in the absence of an express agreement binding upon those whose interests are adversely affected."
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> This record contains no agreement, express or otherwise, by the Strothers or National Bank of Detroit to revive plaintiff's lien. The fact that the waiver of lien ran to Bratko alone is of no consequence. The waiver described the property as it was described in the sales agreement between plaintiff and Bonar and Bratko, the deed to the Strothers and their mortgage to National Bank of Detroit, and the statement of account and lien filed by plaintiff. There is no question that the waiver applied to the lien plaintiff asserted on the premises of the Strothers. [*Poole-Dickie Lumber*, *supra* at 323-324.]

Poole-Dickie Lumber is consistent with MCL 570.1115(4) and (6). Once payment is made to obtain a waiver of lien, the waiver is not thereafter rendered ineffective unless the person making the payment had written notice that the consideration provided for the waiver was lacking. This is consistent with the act's purpose of protecting not only contractors providing services and materials, but also property owners from having to pay twice. Accordingly, the waivers of lien here precluded plaintiff from asserting its construction lien against the property owners.

But because the waivers of lien were not part of the pleadings, it was improper to grant summary disposition under MCR 2.116(C)(8). Nonetheless, the waiver of liens established that there was no genuine issue of material fact with respect to the enforceability of plaintiff's construction lien against the property owners, so the property owners were entitled to summary disposition under MCR 2.116(C)(10). Accordingly, we affirm the trial court's order dismissing the property owners from this action.[3]

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[3] On appeal, defendants argue that summary disposition was proper under MCR 2.116(C)(8) because plaintiff's construction lien was "overly broad," in that it was filed against multiple properties in the condominium development, and was, therefore, invalid and unenforceable. Given our conclusion that the property owners were entitled to summary disposition under MCR 2.116(C)(10), we need not address this issue.

II. Bench Trial Verdict

Plaintiff also argues that the trial court erred in finding that Strange and Hysen were not individually liable for violating the Michigan builders' trust fund act ("MBTFA"), MCL 570.151 *et seq.*, and that plaintiff was not entitled to treble damages. A trial court's findings of fact at a bench trial are reviewed by this Court under the clearly erroneous standard. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding of fact is clearly erroneous when "the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 329-330.

The trial court found that Echelon breached its contract with plaintiff by failing to pay the balance owed for materials supplied by plaintiff, but that Echelon was entitled to various credits against the amount owed pursuant to the terms of the parties' agreement, and also because Echelon had paid plaintiff's undisputed debt to a third party. However, the trial court found that the evidence did not support plaintiff's claim for treble damages under the MBTFA or for conversion.

Plaintiff argues that it established a violation of the MBTFA, relying on MCL 570.151, MCL 570.152, and MCL 570.153, which respectively provide:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes. [MCL 570.151.]
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> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court. [MCL 570.152.]
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> The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud. [MCL 570.153.]

Plaintiff also argues that it is entitled to treble damages pursuant to MCL 600.2919a, for the alleged violation of the MBTFA.

Courts have recognized a civil cause of action for violation of the MBTFA. *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 48; 631 NW2d 59 (2001). As explained in *DiPonio*:

> The prima facie elements of a civil cause of action brought under the act include (1) the defendant is a contractor or subcontractor engaged in the building construction industry, (2) a person paid the contractor or subcontractor for labor or materials provided on a construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project. [*Id.* at 49.]

The intent of the act is to prevent contractors from juggling funds between unrelated projects, for instance, by paying suppliers on older projects with funds received for more current operations, possibly leaving some suppliers unpaid if the builder became insolvent. *Id.*

In *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 519-521; 742 NW2d 140 (2007), this Court stated:

> Officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully. *People v Brown*, 239 Mich App 735, 739-740; 610 NW2d 234 (2000). "'[A] corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation.'" *Id.*, quoting *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). If a defendant personally misappropriates funds after they are received by the corporation, he or she can be held personally responsible under the MBTFA. *Brown, supra* at 743-744.
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> And this Court has further explained that "a reasonable inference of appropriation arises from the payment of construction funds to a contractor and the subsequent failure of the contractor to pay laborers, subcontractors, materialmen, or others entitled to payment." *People v Whipple*, 202 Mich App 428, 435; 509 NW2d 837 (1993). In *Whipple*, this Court held that the prosecutor in a criminal matter need not "prove 'what the defendant did with the money' if a reasonable inference of appropriation is present." *Id.* at 436.

Plaintiff argues that the evidence established a violation of the MBTFA because it showed that Echelon did not retain funds to pay all of its invoices, yet paid other business expenses and made distributions to its owners, Strange and Hysen. At the time plaintiff submitted its invoices, Echelon was receiving draws from its lender, and that money was required to be paid to materialmen, suppliers, and laborers first. As the trial court found, however, the evidence showed that Echelon did not pay plaintiff's invoices because of a

legitimate belief that plaintiff had improperly marked up its prices and had not given Echelon credits against the amounts due in accordance with the parties' agreement.

Further, contrary to what plaintiff argues, Strange did not admit that he used funds that should have been held in trust to pay other business expenses. Rather, Strange only admitted that Echelon paid other expenses from the funds it received. According to Strange, however, Echelon's source of funds was not limited to draws for this project. Strange also testified that the project was losing money and that he contributed additional, personal money to keep the project going. Plaintiff did not show that any funds that were supposed to be held in trust were not used to pay other materialmen, laborers, or suppliers, and instead were used for other expenses. Accordingly, the trial court did not clearly err in finding that plaintiff failed to establish a violation of the MBTFA.

Plaintiff also failed to show that either Hysen or Strange received distributions of any money that should have been paid to contractors or materialmen. In fact, there was testimony that the project was losing money and that Strange contributed additional funds of his own to keep the project going. Therefore, the trial court did not clearly err in finding that neither Hysen nor Strange were individually liable.

Absent a violation of the MBTFA, plaintiff is not entitled to treble damages.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering