

STATE OF MICHIGAN
IN THE SUPREME COURT

H.A. SMITH LUMBER & HARDWARE CO.,
a Michigan corporation,

Plaintiff/Counter-Defendant/Appellee,

S.C. No.

C.A. No. 238521

C.C. No. 99-015436-CZ

vs.

JOHN DECINA,

Defendant/Cross-Defendant/Appellant,

vs.

JOHN DECINA DEVELOPMENT CO., a
Michigan corporation,

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

vs.

LINAS P. GOBIS and LYDIA K. GOBIS,

Defendants/Cross-Plaintiffs/
Cross-Defendants/Counter-Defendant/Appellees,

vs.

WILLIAM GARDELLA, d/b/a WILLIAMS
GLASS COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff/
Third Party Plaintiff/Appellees.

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APPELLEE'S H.A. SMITH LUMBER & HARDWARE'S BRIEF
IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

- I DID THE COURT OF APPEALS ERR IN INTERPRETING MCL 570.1118(2) TO PERMIT SMITH LUMBER AND WILLIAMS GLASS TO RECOVER ATTORNEY FEES FOR PREVAILING IN THEIR CONTRACT CLAIMS AGAINST DECINA AND DECINA CO.?

The Court of Appeals answered this question “no.”

Appellees- H.A. Smith Lumber and Williams Glass contend the answer is “no.”

Appellants Decina and Decina Co. contend the answer is “yes.”

COUNTER STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Appellant H.A. Smith Lumber & Hardware agrees with Appellee's Statement of Facts and Material Proceedings except for the following:

1. In its Motion for Entry of Judgment and Award of Attorney Fees, Smith Lumber relied upon the Court's ruling that Decina personally was liable for attorney fees to Smith Lumber and the language of the credit application, which states in pertinent part:

"The purchaser also agrees to pay reasonable attorney fees and other costs incurred for collection." (Appendix A).

2. Homeowners admit paying Builder \$330,000.00 and filed Affidavits with their Answers to Complaint to that effect (9-17-01, Tr. Pages 47-48). Homeowners admit to a contract price of \$369,400.00 (9-18-01, Tr. Page 205.)

3. John Decina personally at all times disputed owing contract balances claimed by Smith Lumber.

4. At the conclusion of the trial, Judge Jourdan placed his Opinion on the record in which he ruled that Smith Lumber and Williams Glass had valid construction liens against the property, but that they could not enforce those liens as the contract price was paid by the Homeowner (9/18/01 Tr. Pp282-286).

5. On November 7, 2001, the Trial Court heard Plaintiff's Motion for Attorney Fees. The Court found John Decina personally liable for attorney fees to Smith Lumber in the amount of \$9,000.00 pursuant to the language of the Application for credit (11/7/01 Tr. Pp. 6, 10).

ARGUMENTS

I. THE COURT OF APPEALS PROPERLY HELD THAT MCL 570.1118(2) PERMITS SMITH LUMBER AND WILLIAMS GLASS TO RECOVER ATTORNEY FEES FOR PREVAILING IN THEIR CONTRACT CLAIMS AGAINST DECINA AND DECINA CO.

Appellee H.A. Smith Lumber & Hardware Co. ("Smith") supplied lumber and materials for the improvement to property owned by Linas and Lydia Gobis pursuant to a contract between Smith and Appellants. Smith was not paid by Appellants for the lumber and materials, and filed a construction lien on the Gobis' property. Smith then filed the present action to foreclose the lien and to collect on the contract.

MCL 570.1105 (2) defines "Lien Claimant", and states:

"Lien claimant' means a person having a right to a construction lien under this act."

MCL 570.1107 (1) sets forth who is entitled to a construction lien, and states:

"Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property shall have a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property, as described in the notice of commencement provided for by section 108 or 108a, the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has required the improvement. 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."

Pursuant to the Act, Smith was a lien claimant, and the Trial Court ruled that Smith had a valid construction lien (9/18/01 Tr. Pp282-286).

The attorney fees provision of the Construction Lien Statute, MCL 570.1118(2) states:

"In each action in which enforcement of a construction lien through foreclosure is sought, the court shall examine each claim and defense that is presented, and determine the amount, if any, due to each lien claimant or to any mortgage or holder of an encumbrance, and their respective priorities. The court may allow

reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious. Attorneys' fees allowed under this section shall not be paid from the homeowner construction lien recovery fund created under part 2."

The statute allows attorney fees to a prevailing party who is a lien claimant. It does not require the party to be a "prevailing lien claimant", as Appellant has claimed. Smith Lumber was a prevailing party, the Trial Court having ruled that it had a valid construction lien (9/18/01 Tr. Pp282-286) and awarding full damages against Appellants as contractor.

Appellants' apparent position is that while an unpaid subcontractor can file a valid construction lien on a property, if the property owners have paid the full amount of the contract, the Construction Lien Act is no longer applicable. Such is not the case. In fact, MCL 570.1117 (5) states:

"In connection with an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose."

Further, Part 2 of the Act, MCL 570.1201, et seq., sets out in detail what occurs when a contractor has failed to pay a subcontractor and the owner has paid in full, hence the creation of the Homeowner Construction Lien Recovery Fund. The Fund was set up to pay affected subcontractors. MCL 570.1203 allows a lien claimant who is precluded from recovering on the lien from the property owner because of the owner's payment of the contract price to recover the contract amount from the Fund (which was not available in this case because Appellants were not licensed, as required by MCL 570.1203 (h)). Thus, even where the owner is found not responsible for payment, the Act continues to afford remedies for the subcontractor to collect the contract amount. MCL 570.1205 (2) states in pertinent part:

"If a payment is made by the department from the fund, the department shall be subrogated to the rights of the person to whom the payment was made, and the department may maintain an action in its own name against the contractor or subcontractor who did not pay the claimant receiving the payment from the fund."

Pursuant to the above, if the Fund has to pay, the contractor is still liable to the Fund for the repayment of the lien amount.

Finally, MCL 570.1302 (1) states:

"(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."

The intent and purpose of the Act is to secure payment on a construction lien, either from the nonpaying owner, or where the owner has paid, from the nonpaying contractor or the Fund. While MCL 570.1118 (2) specifically precludes a lien claimant from recovering attorney fees from the Fund, it does not preclude the lien claimant who is the prevailing party from recovering attorney fees from the contractor who has failed and refused to pay the lien claimant its contract price.

The Mechanics Lien Act was the previous incarnation of the Construction Lien Act. It had a similar attorney fee provision MCL 570.12), which read:

"The court shall examine all claims that shall be presented, and shall ascertain and determine the amount due to each creditor who has a lien of the kind before mentioned upon the estate in question, and every such claim that is due absolutely and without any conditions, although not then payable, shall be allowed, with a rebate of interest to the time when it would become payable. The court may, in its discretion, allow a reasonable attorney's fee when judgment shall be rendered in such proceeding, in favor of the parties succeeding therein."

The Court in *Sturgis Saving & Loan v Italian Village*, 81 Mich. App 577 (1978)

addressed this attorney fees provision, holding attorney fees were properly awarded

even though the issue was not the dispute of a lien, but the waiver of a lien. The court held:

“Plaintiff also challenges the applicability of MCLA 570.12; MSA 26.292, which provides for reasonable attorney's fees in proceedings concerning mechanics' lien claims. Plaintiff argues that this case is not disputing a lien but rather the alleged waiver of it; a simple contract case. However, the purpose of the statute is remedial and it should not be narrowly construed. The language of the statute reads to "determine the amount due to each creditor who has a lien" which covers the issues presented here. The trial court did not abuse its discretion in permitting the awarding of attorney's fees.” 81 Mich. App at 583-4.

In *Bosch v Altman Construction*, 100 Mich. App 289 (1980), also applying MCL 570.12, the plaintiff brought a lien foreclosure action in circuit court and a separate breach of contract action in district court. The Plaintiff received a judgment for the full amount on the contract action in district court in an order which required the plaintiff to sign a discharge of lien upon satisfaction of the judgment. The judgment amount did not include attorney fees. On the morning of the circuit court trial, the defendant tendered a check in full satisfaction of the judgment and the plaintiff signed a discharge of the lien. At the circuit court trial, the defendant argued that the court no longer had jurisdiction due to the payment and discharge. The court did not agree. The trial court held the plaintiff had a valid lien and awarded the plaintiff the same damages as the district court judgment plus attorney fees pursuant to MCL 570.12.

On appeal, the defendant argued that the discharge of the lien prior to the trial made the Mechanics Lien Act inapplicable, as there was no longer a lien in dispute.

The Court of Appeals disagreed, analyzing and holding as follows:

“We believe it would clearly violate the spirit of the mechanics' lien statute to permit a lienee to force a lienor to accept payment of a lien claim just before the commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees. Under such a rule, a lienee could drag a lienor through costly pretrial proceedings in the hope of gaining a beneficial settlement

without putting himself in jeopardy of paying the attorney fees of the lienor. Many a materialman, lacking in deep financial resources, would be seriously hampered in pursuing his legal remedies. The purpose of MCL 570.12; MSA 26.292, is to avoid such a situation.

In the present case, the trial judge had issued an order requiring plaintiff to accept the payment tendered by defendants and to discharge the lien. The court based its ruling on MCL 570.23; MSA 26.303, which reads as follows:

"When the debt secured by such lien is fully paid, the lien holder shall execute to such owner, part owner, or lessee, or other person having an interest or title in the lands, buildings [building], machinery, structure, or improvements affected by such lien, a discharge as in case of a discharge of a mortgage, or shall indorse such discharge on such claim of lien filed, and upon refusal to do so on demand, shall be subject to like penalties as are provided by law for refusal to discharge mortgages which have been fully paid."

The payment and discharge of the claim was not made until the morning of the trial.

We conclude that a lienor is not required to accept tender of payment after a complaint has been filed if he wishes to pursue his statutory right to attorney fees. In exercising his discretion under MCL 570.12; MSA 26.292, the trial judge could consider the stage of the proceedings at which the offer of payment was made and refused.

It is obvious that the judge entered the judgment on the lien in an attempt to come within the language of § 12 of the act so that he could award attorney fees. The trial judge expressed his resentment of the tactics used by defendants in seeking to avoid payment of attorney fees. We hesitate to affirm the judge's ruling on the basis that a judgment was rendered in this case in view of the fact that plaintiff had previously signed a discharge of the lien and a satisfaction of judgment.

As alluded to above, we believe that the trial judge erred in ordering plaintiff to execute the discharge of the lien. Once the lien foreclosure complaint had been filed, plaintiff should have been permitted to refuse payment and proceed to judgment and a determination of whether attorney fees should be awarded. Where the trial judge reaches the right result for the wrong reason, that result will not be disturbed on appeal. *Queen Ins Co v Hammond*, 374 Mich 655, 658-659; 132 NW2d 792 (1965). We apply that rule to this case in view of the equities involved. The fact that plaintiff had signed a discharge of the lien pursuant to the trial court's order does not justify reversal of the trial court's decision." 100 Mich. App at 296-8.

In Bosch, the award of attorney fees was based on the validity of the lien, not the payment. Despite the separation of the contract and lien actions and the discharge of the lien, the remedial nature and liberal construction of the statute required the award of attorney fees to stand. In the case at bar, at the time of trial, Smith had not been paid **and** the court held that Smith had a valid, perfected lien. Construing the Construction Lien Act liberally and acknowledging its remedial nature, the trial court's award of attorney fees should be proper.

Pursuant to the above, while it cannot collect from the property owners, Smith is a prevailing lien claimant and the provisions of the Construction Lien Act continue to provide it procedures and remedies against the contractor, including the awarding of attorney fees pursuant to MCL 570.1118(2).

II. APPELLANTS' ARGUMENTS ARE MOOT AS THE TRIAL COURT FOUND JOHN DECINA PERSONALLY LIABLE FOR BREACH OF CONTRACT THROUGH THE CREDIT APPLICATION, WHICH MADE JOHN DECINA PERSONALLY LIABLE AS WELL FOR COSTS OF COLLECTION AND REASONABLE ATTORNEY FEES.

Even if MCL 570.1118(2) does not apply, Appellant John Decina is personally liable to Smith for payment of costs of collection and reasonable attorney fees through the language of the credit application, making Appellants' arguments moot.

The Trial Court construed the John Decina's Credit Application to impose liability on Decina personally. The construction of a written contract is a question of law for the court where the contract is not ambiguous. Grocery Co. v Purchasing Co., 289 Mich. 225 (1939). The standard of review for questions of law is de novo. Alexander v. Riccinto, 192 Mich App 65, 70 (1991).

The credit application (See Appendix A) signed by John Decina was properly

introduced as an exhibit at trial (9/17/01 Tr. p. 21). H.A. Smith President James Peterson testified that the name "John Decina Development Corporation" did not appear on the application ((9/17/01 Tr. p. 21). He further testified that there was nothing that would identify the application as belonging to John Decina Development Corporation (9/17/01 Tr. p. 21). As also testified to by Mr. Peterson, the application contained no corporate I.D. number, only a social security number (9/17/01 Tr. p. 36). No evidence or testimony was introduced by any party to contradict Mr. Peterson's testimony that the credit application was in the name of John Decina personally.

Throughout the course of the trial, Plaintiff was informed by the Court that the matter of attorney fees was not an issue for trial, but was to be addressed by motion after trial (9/17/01 Tr. pp. 63-4). In its Motion for Entry of Judgment and Award of Attorney Fees, Smith Lumber relied upon the Court's ruling that Decina personally was liable for attorney fees to Smith Lumber and the language of the credit application, which states in pertinent part:

"The purchaser also agrees to pay reasonable attorney fees and other costs incurred for collection." (Appendix A).

The Court acknowledged this language (11/7/01 Tr. p. 6), and refused to award actual attorney fees based upon the "reasonable attorney fees" language (11/7/01 Tr. p. 10), and instead awarded what it deemed "reasonable attorney fees" of \$9,000.00.

Appellants' arguments that the credit application was for John Decina Development Corporation are not plausible. No name other than John Decina appears on the application. No federal ID number was supplied. Rather, Social Security Numbers, which do not apply to a corporation, are indicated. Further, the Michigan Builder's License given is in the name of John Decina, individually, not John Decina Development Corporation

(9/17/01 Tr. pp. 194-5). With no additional information, Smith Lumber could not be held to infer that the credit application was for John Decina Development Corporation or any other corporation that John Decina may have had an interest in at the time. Based upon the information given, the Court properly found that the credit application was personal to John Decina. Accordingly, the Court awarded attorneys fees to Smith Lumber based upon the language of the credit application and the finding that the credit application was personal to John Decina. As such, even if this Court finds that MCL 570.1118(2) is not applicable, Smith was properly awarded attorney fees under the express contractual terms of the credit application and Appellants' arguments are moot.

RELIEF REQUESTED

WHEREFORE, Appellee, H.A. SMITH LUMBER & HARDWARE CO., respectfully requests this Honorable Court to:

A. Affirm the award to Smith Lumber of damages of \$9,233.00 and attorney fees of \$9,000.00 against John Decina personally or, in the alternative, award Smith Lumber actual attorney fees incurred.

B. Remand to the trial court for determination of attorney fees incurred as a result of appeal from Decina to Smith Lumber pursuant to MCL 570.1118(2).

JEROME & AUSTIN, P.C.

Date: May 10, 2005

By: _____


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