

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.

APPELLEE'S H.A. SMITH LUMBER & HARDWARE'S
SUPPEMENTAL BRIEF ON APPEAL

JAMES R. AUSTIN (P-43400)
Law Offices of James R. Austin, PC
PO Box 304
Milford, MI 48381
248-676-8178

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STATEMENT OF SUBJECT MATTER

This Court's April 13, 2007 Order notified the parties that it will schedule this case for oral argument on the issue of whether the lien claimants, plaintiff HA Smith Lumber & Hardware Co and defendant William Gardella d/b/a Williams Glass Company were entitled to attorney fees as prevailing parties under MCL 570.1118(2).

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.”

- II DID THE COURT OF APPEALS ERR IN AWARD ATTORNEY FEES AGAINST DECINA AND DECINA CO. INSTEAD OF AGAINST THE REAL PROPERTY?

The Court of Appeals answered this question “no.”

Appellees- H.A. Smith Lumber contends the answer is “no.”

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

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”) clearly established in its previous briefs that Smith was a lien claimant pursuant to the Michigan Construction Lien Act. Contrary to Appellants’ contention, the Trial Court ruled that Smith had a valid construction lien (9/18/01 Tr. pp 282-286).

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 Court in *State Bd. of Education v. Houghton Lake Community Schools*, 430 Mich. 658, 671 (1988) in interpreting statutory language, held:

“However, as we have previously held, every word of a statute should be given meaning, and no word should be treated as surplusage or rendered nugatory if at all possible.”

Thus, in order to determine whether Smith is entitled to attorney fees pursuant to the Michigan Construction Lien Act (CLA), the components of the statute must be examined, given their plain meaning and applied to the instant case. Further, it should be done so that no particular word or phrase should negate the effect of another or the effect on other components of the CLA.

MCL 570.1117(5) allows a plaintiff to incorporate a breach of contract claim in its action for foreclosure and 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.”

Thus, an “action in which foreclosure of a construction lien is sought” may include a claim against a general contractor for breach of contract with a subcontractor or supplier. The plain language of 570.1118(2) does not separate the foreclosure claim from the breach of contract claim, but rather, addresses the “action”. This Court in CAM Construction. v. Lake Edgewood Condo. Ass'n, 465 Mich. 549, 554-555 (2002) addressed the difference between “claim” and “action”, holding:

“A "claim" is defined as:

1. The aggregate of operative facts giving rise to a right enforceable by a court 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional 3. A demand for money or property to which one asserts a right [Black's Law Dictionary (7th ed).

An "action" is defined as:

1. The process of doing something; conduct or behavior. 2. A thing done 3. A civil or criminal judicial proceeding. [Id.]

Thus, according to the plain meaning of these words, a claim consists of facts giving rise to a right asserted in a judicial proceeding, which is an action. In other words, the action encompasses the claims asserted.” 465 Mich at 554-5.

Pursuant to the reasoning of CAM Construction, an “action in which the enforcement of a construction lien is sought” would include all claims asserted in the complaint, including the breach of contract claim. Had the legislature sought to include only the claim of lien foreclosure in 570.1118(2), it would have used the term “claim” rather than “action”.

Smith filed an action with claims of foreclosure of lien, breach of contract, quantum meruit, violation of the Builder’s Trust Fund Act, and account stated. Based upon CAM Construction, Smith’s action in which foreclosure of its lien was sought would include its other enumerated claims, and thus all such claims, not just the foreclosure claim, would be included as an “action” for the purposes of 570.1118(2).

570.1118(2) next states:

“The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party.”

570.1105(2) defines “lien claimant” as:

“‘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.”

The Trial Court held that Smith had a proper, valid lien (9/18/01 Tr. pp. 282-286). Thus Smith was a lien claimant for the purposes of 570.1118(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. When a plaintiff pleads different theories, each of which seeks to recover for the same injury, and recovery under any theory would entitle the plaintiff to recover the full measure of its damages, the plaintiff need only recover on one theory to be considered the prevailing party. Addressing this issue, the Court in *Van Zanten v. H. Vander Laan Co., Inc.*, 200 Mich. App 139, 141 (1993) held:

“Although plaintiff did plead three different theories of why she was entitled to recover damages against defendant, each of those theories sought to recover for the same injury and recovery under any theory would have allowed plaintiff to recover the full measure of her damages. Accordingly, it was necessary for plaintiff to prevail only on one theory in order to be considered a prevailing party.”

The Court of Appeals thus properly held that Smith Lumber was a “prevailing party” for the purpose of being awarded attorney fees under the Michigan Construction Lien Act.

Finally, the final part of 570.1118(2) states:

“Attorneys' fees allowed under this section shall not be paid from the homeowner construction lien recovery fund created under part 2.”

Thus the only exception to payment of attorney fees to a lien claimant who is a prevailing party specifically set out in 570.1118(2) is where the Fund pays a lien claimant. The Fund only pays a lien claimant when the owner has paid the full contract amount to the contractor. In such a case, pursuant to MCL 570.1203(1), the lien does not attach to the residential structure.

Appellants argue that Smith cannot collect attorney fees pursuant to 570.1118(2) because even though valid, its lien did not attach. However, were such the case, 570.1118(2) would have precluded payment of attorney fees to any lien claimant whose lien did not attach to the property. Instead, it only specifically excluded only those that collect from the Fund. It cannot be assumed that the Legislature intended to exclude a group of lien claimants by omission when it specifically excluded another. It must instead be assumed that only those parties specifically excluded are indeed excluded, and all other lien claimants which are prevailing parties, such as Smith, are included.

Pursuant to the above, Smith was a lien claimant that was a prevailing party in an action in which enforcement of a construction lien through foreclosure was sought. Lien claimants with liens which do not attach to the property are not specifically excluded unless they collect their payment from the Fund. As Smith has collected its judgment from Decina, and not the Fund, it is not specifically excluded from being awarded attorney fees via 570.1118(2). Accordingly, the Trial Court and Court of Appeals properly awarded attorney fees to Smith under the CLA.

II. THE COURT OF APPEALS PROPERLY AWARDED ATTORNEY FEES AGAINST DECINA AND DECINA CO. INSTEAD OF AGAINST THE REAL PROPERTY.

Appellants claim that in an action to foreclose on a construction lien, attorney fees would be a charge against the property and not the obligation of either the homeowner or contractor. Smith adequately addressed this in its first brief to this Court, relying on the holding in Solution Source, Inc. v LPR Associated Ltd. Partnership, 252 Mich. App. 368 (2002). However, Smith would add that Appellants' position is not supported by the terms of the CLA. MCL 570.1121(1) allows a court to order a construction lien satisfied out of the rents, profits, and income from the real property to which the construction lien has attached, rather than solely from the foreclosure of the property.

Further, MCL 570.1124(1) sets forth the distribution of funds from the foreclosure sale, and allows for a deficiency judgment against a contracting party. It states:

“Upon the completion of the sale of the real property, the receiver shall prepare and submit a final account for examination and approval by the court. The court shall enter a final order directing the distribution of all funds or other assets held by the receiver. Repayment of funds borrowed by the receiver, under court authority, for the completion of improvements, or for any other purpose shall have priority in the distribution, unless a different priority has been ordered by the court. The next priority shall be that of funds expended by the receiver, including his or her fees and those of his or her attorneys and agents. The remaining funds shall be distributed to the parties in the order of the priority of their respective liens, encumbrances, or other rights as determined by the court. The court shall adjudicate the right, if any, to a deficiency judgment against any contracting party.”

Attorney fees are awarded as a part of the judgment in this matter. If the CLA allows for a deficiency judgment against *any contracting party* where foreclosure sale funds would not sufficiently cover the claims, it would allow collection of that deficiency judgment against other than the property itself.

In this matter, Smith obtained a judgment for damages and attorney fees against Decina

and Decina Co., who were contracting parties. Pursuant to the terms of 570.1124(1), a judgment, including attorney fees, may be awarded against Appellants as contracting parties.

RELIEF REQUESTED

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

- A. Affirm the award to Smith Lumber of 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).

Law Offices of James R. Austin, PC

Date: May 18, 2007

By: 
JAMES R. AUSTIN (P-43400)
Attorney for Appellee HA Smith Lumber &
Hardware Co.
P.O. Box 304
Milford, MI 48381
248-676-8178