

STATE OF MICHIGAN
IN THE SUPREME COURT

H.A. SMITH LUMBER & HARDWARE CO
Plaintiff/Counter-Defendant/Appellee,

vs.

S. C: 128560
C. O.A: 238521
Oakland CC: 1999-015436-CZ

JOHN DECINA
Defendant/Cross-Defendant/Appellant,
and

JOHN DECINA DEVELOPMENT CO,
a Michigan corporation,
Third Party Defendant/Cross-Defendant/
Counter-Plaintiff/Appellant,
and

LINAS P. GOBIS and LYDIA K. GOBIS,
Defendants/Cross-Plaintiffs/Cross-Defendants/
Counter-Defendants/Appellees,
and

WILLIAM GARDELLA d/b/a WILLIAMS
GLASS COMPANY,
Defendant/Counter-Plaintiff/Cross-Plaintiff/
Third Party Plaintiff/Appellee.

128560
Supp

APPELLANTS JOHN DECINA AND JOHN DECINA DEVELOPMENT CO'S
SUPPLEMENTAL BRIEF ON APPEAL

FILED

MAY 15 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

ROSATI ASSOCIATES, P.C.



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Dated: May 14, 2007

STATEMENT OF SUBJECT MATTER

The parties have been notified by this Court's order of April 13, 2007, that the Clerk has been directed to schedule this case for oral argument to address the question of whether the lien claimants, plaintiff H.A. Smith Lumber & Hardware Company (H.A. Smith) and defendant William Gardella d/b/a Williams Glass Company (Williams Glass) are entitled to attorney fees from defendants John Decina (Decina) and John Decina Development, Inc.(Decina Co) as prevailing parties under MCL 570.1118(2). This issue poses 2 questions. First are these lien claimants prevailing parties under MCL 1118(2)? Second, if they are prevailing parties can their judgments be satisfied only out of the real estate? Every subcontractor has two remedies, a contract action against the entity he contracted with, and an in rem action to assert a lien against the real estate. This brief is concerned with the in rem action by H.A. Smith and Williams Glass to attach a lien to the real estate.

STATEMENT OF QUESTIONS INVOLVED

I

DID THE COURT OF APPEALS AND TRIAL COURT ERR IN HOLDING THAT H. A. SMITH AND WILLIAMS GLASS WERE PREVAILING PARTIES UNDER MCL 570.1118(2); MSA 26.316(118)?

The lower courts answered this question “No”.

Appellee’s contend the answer is “No”.

Appellant’s contend the answer is “Yes”.

II

ASSUMING ARGUENDO THAT H. A. SMITH AND WILLIAMS GLASS’S LIENS ATTACHED TO THE REAL ESTATE, DID THE COURT OF APPEALS AND TRIAL COURT ERR IN AWARDING THEM ATTORNEY FEES AGAINST DECINA AND DECINA CO INSTEAD OF ASSESSING THE ATTORNEY FEES AGAINST THE REAL ESTATE?

The lower courts answered this question “No”.

Appellee’s contend the answer is “No”.

Appellant’s contend the answer is “Yes”.

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Statutes Cited:

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Dictionaries:

Black’s Law Dictionary, Seventh Edition, p 1145 5

Ballantine’s Law Dictionary, with Pronunciations, p 985 5

Argument

I.

THE COURT OF APPEALS AND TRIAL COURT ERRED IN HOLDING THAT H. A. SMITH AND WILLIAMS GLASS WERE PREVAILING PARTIES UNDER MCL 570.1118(2); MSA 26.316(118).

Statutory interpretation is a question of law that is subject to review de novo on appeal.

Kent Aero Bd v State Police, 239 Mich App 563; 609 NW2d 593 (2000); *Rose Hill Center, inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

The issue of a prevailing party's right to an award of attorney fees is presented in MCL 570.1118(2) which provides in pertinent part as follows:

(2) * * * The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court may also 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 frivolous. Attorneys' fees allowed under this section shall not be paid from the homeowner construction lien recovery fund created under part 2.

Black's Law Dictionary, Seventh Edition, p 1145 defines prevailing party:

prevailing party. A party in whose favor a judgment is rendered, regardless of the amount of damages awarded < in certain cases, the court will award attorney's fees to the prevailing party >. —Also termed *successful party*.

Ballantine's Law Dictionary, with Pronunciations, p 985 defines prevailing party:

prevailing party. The party who is successful or partially successful in an action, so as to be entitled to costs. 20 Am J2d Costs §§ 14, 15.

To be a prevailing party does not depend upon the degree of success at different stages of the suit; but upon whether at the end of the suit or other proceeding, the party, who has made a claim against the other, has successfully maintained it. If he has, he is the

prevailing party. *Bangor & Piscataquis Railroad Co. v Chamberlain*, 60 Me 285, 286.

The issue of prevailing party appears only in MCL 570.1118(2) where consideration is given to an award of attorney fees. There is no dispute that H. A. Smith and Williams Glass procedurally perfected their liens. However, their liens did not attach to the real estate by virtue of the fact that the owners, the Gobises, filed an affidavit that their contract with Decina Co had been paid in full, a fact substantiated at trial. MCL 500.1203; MSA 26.316(203).

To prevail under MCL 570.1118(2) one must secure a lien that is enforceable. One hardly prevails if their lien does not attach to the real estate which affords them the right to enforce the lien.

H.A. Smith and Williams Glass' reliance on *Solution Source v LPR Associates*, 252 Mich App 368, 379; 652 NW2d 474 (2002) to justify the award of attorney fees against Decina and Decina Co is misplaced. The facts are dissimilar in two instances. First, the owner of the real property is the party liable on the contract so that collection on the contract judgment avoids the circuitous procedure of foreclosure and redemption by the owner. Second, and more significant is that in *Solution*, the plaintiff had a valid construction lien:

We hold that plaintiff's action did not lose its characterization as an action to enforce "a construction lien through foreclosure" simply because plaintiff sought avenues other than foreclosure to satisfy the judgment on its valid construction lien. (Emphasis supplied) 252 Mich App at 379

H.A. Smith and Williams Glass never had a valid construction lien. The lower courts erred in finding that H. A. Smith and Williams Glass were prevailing parties under MCL 570.1118(2).

II.

ASSUMING ARGUENDO THAT H. A. SMITH AND WILLIAMS GLASS'S LIENS ATTACHED TO THE REAL ESTATE, THE COURT OF APPEALS AND TRIAL COURT ERRED IN AWARDING THEM ATTORNEY FEES AGAINST DECINA AND DECINA CO INSTEAD OF ASSESSING THE ATTORNEY FEES AGAINST THE REAL ESTATE

Statutory interpretation is a question of law that is subject to review de novo on appeal.

Kent Aero Bd v State Police, 239 Mich App 563; 609 NW2d 593 (2000); *Rose Hill Center, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

Dane v Royal's Wine & Deli, 192 Mich App 287, 292 -293; 480 NW2d 343 (1991) app den 440 Mich 84 (1992), rec den 494 NW2d 746 (1992) describes the in rem proceeding of foreclosure of the construction lien:

An action to enforce a construction lien through foreclosure is a proceeding against property that has been improved through the lienholder's services. *Canvasser Custom Builders, Inc v Siskin*, 38 Mich App 643,638; 196 NW2d 859 (1972); 57 CJS Mechanics Liens, § 265, p 873. Such an action is equitable in nature. MCL 570.1118(1); MSA 26.316(118)(1). Although the proceeding to foreclose on the construction lien originates from the contract, it is an action directed at the property rather than the person or entity who contracted for the services and is separate and distinct from an action for breach of contract. *Canvasser, supra* at 648-649.

Our Legislature recognized the need to convert a construction lien into funds and set forth the requirements for foreclosure of the lien. MCL 570.1117; MSA 26.361(117). It follows that if the lien is paid through foreclosure of the lien against the real property, the awarded attorney fees must be paid from the same source.

The Court of Appeals and trial court erred in awarding attorney fees against Decina and

Decina Co under MCL 570.1118(2) rather than the real property.

Relief Requested

Defendants/Appellants John Decina and John Decina Development Co respectfully request this Honorable Court to reverse the lower courts award of attorney fees to H.A. Smith and Williams Glass against said Appellants as said lien claimants are not prevailing parties undrer MCL 570.1118(2).

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