

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

ROBERSON BUILDERS, INC.,

Plaintiff/Counter-Defendant-Appellant,

Docket No. 132363

v

JAMES LARSON,

Defendant/Counter-Plaintiff-Appellee.

APPELLANT'S REPLY BRIEF

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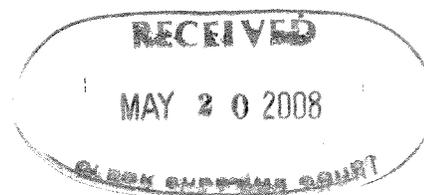


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INTRODUCTION

Appellant, Roberson Builders, Inc. (“Roberson”) filed its brief in this matter on March 28, 2008. Appellee, James Larson, (“Larson”) filed a responsive brief on or about April 30, 2008. The following constitutes Roberson’s Reply to the arguments raised in Larson’s brief.

ARGUMENT

I

LARSON CONCEDES THAT THIS MATTER INVOLVES A RECOUPMENT AND BECAUSE RECOUPMENT IS “A DOCTRINE OF AN INTRINSICALLY DEFENSIVE NATURE” THIS COURT SHOULD FIND THAT APPELLANT’S CLAIM FOR SETOFF, BASED UPON RECOUPMENT IS AN AFFIRMATIVE DEFENSE

In its responsive brief Larson concedes that the setoff permitted by the trial court in this matter was in the nature of a recoupment. Larson likewise concedes that the doctrine of recoupment has oftentimes been referred to as a “defense” or “affirmative defense” (Appellee’s Brief, p 7). Moreover, as indicated in Roberson’s original brief, in the recent case of *Minority Earth Movers, Inc, v Walter Toebe Construction Co.*, 251 MichApp 87; 649 NW2d 397 (2002), which involved underlying claims of breach of contract and performance very similar to those herein, the Court of Appeals, citing to 20 Am. Jur. 2d, Counterclaim, Recoupment, etc., §5, p. 231, stated that recoupment is ‘a doctrine of an intrinsically defensive nature.’”

Thus, Larson’s narrow conclusion that Roberson’s setoff was a “counterclaim” despite the wide history of setoff’s being defensive in nature, is unwarranted. Rather, because a setoff may either be a counterclaim or affirmative defense, as illustrated in Roberson’s original brief, a better practice would be to examine each case to determine

whether the setoff is being used offensively or defensively. Here there is no question that it was being used defensively. Had Larson not filed a counter-complaint, as held by the trial court, Roberson would not have been able to assert any claim against Larson. It was only in its defensive posture that Roberson was permitted to present evidence of performance to counter Larson's alleged damages.

ARGUMENT

II

LARSON'S RELIANCE ON THIS COURT'S OPINION IN *STOKES V MILLEN ROOFING CO.*, 466 MICH 660; 649 NW2D 371 (2002) IS MISPLACED WHERE THE CONTRACTOR IN *STOKES* FILED A *COUNTERCLAIM* SEEKING "REIMBURSEMENT" FOR VALUE OF MATERIALS.

In response to this Court's request to brief the question whether asserting a claim for setoff or recoupment constitutes the "bringing or maintaining" of an action for "collection of compensation" under MCL 339.2412(1), Appellee argues this Court's opinion in *Stokes*, supra is dispositive. However, the underlying facts in *Stokes* are completely inapposite to those herein. In *Stokes* the unlicensed contractor attempted to file a *counterclaim* seeking compensation. Despite the fact the contractor attempted to call it reimbursement, there was no disputing that he filed a counterclaim that sought direct payment from the homeowner. No issue of setoff or recoupment was presented.

In this case, the trial court did not permit Roberson to recover compensation from Larson. Instead, the court permitted Roberson to use his performance as a defense to the amount Larson claimed as damages in his complaint. Such a setoff is the very nature of a recoupment and, as suggested above, is a defense not a counterclaim.

Pursuant to the clear language of the statute, the defense of an action is not prohibited because it does not fall within the language of "bringing or maintaining" an action.

ARGUMENT

III

CONTRARY TO LARSON'S ASSERTIONS, AN APPELLEE IS NOT REQUIRED TO FILE A CROSS-APPEAL TO URGE AN ALTERNATIVE GROUND FOR AFFIRMING THE TRIAL COURT'S ORDER, *VASLEMBROUCK V HALPERIN*, 277 MICH APP 558; 747 NW2D 311 (2008)

Despite the fact the issue whether the Michigan Consumer's Protection Act, MCL 445.903 et seq applies to residential builders was directly addressed by both the trial court and the Court of Appeals (see Roberson's Appendix, pp 18a-35; 40a-41a; 55a-58), Larson continues to argue that the issue cannot be addressed on appeal.

Larson first raised this issue before the Court of Appeals claiming that, absent the filing of a cross-claim on appeal, the issue could not be addressed. However, in so arguing, Larson ignores several clear principles of law. First, an appellee is not required to file a cross-appeal to urge an alternative ground for affirming the trial court's order. *Vslembrouck*, supra.

In this matter, one of the issues Larson raised on appeal was the claim that the trial court erred in submitting to the jury the question whether Roberson violated the MPCA in failing to provide a promised benefit. Under the *Vslembrouck* holding, Roberson was entitled to argue in response to Larson's claim an alternative ground for affirming the trial court's decision not to submit this question to the jury, and thus, the ultimate finding that there was no violation of the MCPA. The alternative ground was that the MCPA did not apply to Roberson's conduct in the first instance.

Other applicable clear principles of law not addressed by Larson that would permit determination of this issue, even if it had not been properly preserved, include an appellate court's authority to raise or address unpreserved issues sua sponte when justice requires,

People v Cain, 238 MichApp 95; 05 NW2d 28 (1999); and the propriety of addressing an issue when it presents a question of law for which the necessary facts have been presented *Farmers Ins. Exchange v Farm Bureau General Ins. Co of Mich*, 272 MichApp 106; 724 NW2d 485 (2006).

ARGUMENT

IV

CONTRARY TO LARSON'S ASSERTIONS, THIS COURT'S OPINION IN *LISS V LEWISTON-RICHARDS INC*, 478 MICH 203; 732 NW2D 514 (2007), DOES NOT DIFFERENTIATE BETWEEN THE BUILDING OF A RESIDENTIAL HOME BY A LICENSED OR UNLICENSED BUILDER WHEN ADDRESSING THE APPLICABILITY OF THE MCPA TO RESIDENTIAL BUILDERS, BUT INSTEAD FOCUSES ON THE GENERAL TRANSACTION OR THE NATURE OF THE BUILDING ITSELF.

Larson attempts to limit the application of this Court's opinion in *Liss*, supra by arguing that the holding does not apply in matters involving unlicensed builders. Larson is attempting to do exactly what this Court stated it was *not* going to do in *Liss*. Larson is focusing on the "actor" rather than on the "action." *Liss*, at 212-213.

Moreover, this Court in *Liss* reaffirmed its decision in *Smith v Globe Life Insurance Company*, 460 Mich 446, 597 NW2d 28 (1999), wherein it stated that "when the Legislature said that transactions or conduct 'specifically authorized' by law are exempt from the MCPA, ***it intended to include conduct the legality of which is in dispute.***" *Id* at 465 (emphasis added). This Court held that:

. . . we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether ***the general transaction is specifically authorized by the law, regardless of whether the specific misconduct alleged is prohibited.*** *Smith, supra* at 465, (emphasis added).

Here Larson contends that the alleged illegality of Roberson's conduct, his engagement in the action of building residences without a license, nullifies the fact that he was engaged in an activity that is specifically authorized by the law, the construction of residences. This argument contradicts this Court's decisions in both *Smith* and *Liss, supra* and should be rejected.

ARGUMENT

V

THE COURT OF APPEALS DECISION IN *MIKOS V CHRYSLER CORP*, 158 MICH APP 781; 404 NW2D 783 (1987) IS LIMITED TO THE FACTS PRESENTED THEREIN AND IS INAPPLICABLE TO THE INSTANT MATTER WHERE THE ISSUE INVOLVES THE PROVISION OF SERVICES RATHER THAN THE MERCHANTABILITY OF A PRODUCT.

In his reply brief Larson indicates that it is "curious" that Roberson does not argue that *Mikos, supra* was wrongly decided (Larson Brief, p 20). Roberson replies that there is nothing at all curious about it. Roberson does not challenge the application of the *Mikos* decision to the facts contained therein, the merchantability of a product. What Roberson does challenge is the Court of Appeals decision in this matter to *extend* the *Mikos* decision beyond facts involving the merchantability of a *product* to the duty to perform *services* skillfully, carefully, diligently, and in a workmanlike manner as set forth in *Nash v Sears, Roebuck & Co*, 383 Mich 136; 174 NW2d 818 (1970).

Roberson contends that the trial court correctly noted the distinction between the *duty* to perform services skillfully and a *warranty* of merchantability of a product. A product that fails is not merchantable, and as the court held in *Mikos*, would necessarily constitute a "failure to provide the promised benefit." It goes without saying that when purchasing a product one is relying on the promise that the product will work for its intended purpose. In

contrast, in contracts involving the performance of services, a party may fail to perform the services skillfully and yet ultimately provide the promised benefit.

For example a contractor may contract with a homeowner to install a driveway and a short adjacent sidewalk leading to the side door of the garage. A contractor providing the service skillfully, carefully, diligently and in a workmanlike manner would more than likely schedule the delivery of enough cement to lay the sidewalk and driveway at the same time, thereby reducing the costs of delivery as well as the subcontracting costs to hire cement layers. A contractor providing the service without sufficient skill, care and diligence might order only enough cement to lay the driveway and have to repeat the process on another day to complete the sidewalk. In the end, the homeowner receives the promised benefit, the sidewalk and driveway. Nonetheless, the homeowner might have a claim for breach of the contractor's duty to perform the services skillfully, carefully and diligently.

The Court of Appeals erred in this matter when it expanded the limited holding of *Mikos*, supra to disputes involving the provision of services.

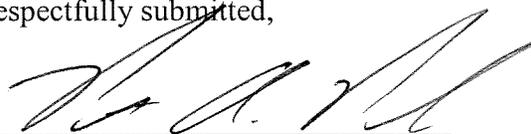
CONCLUSION

The decision of the Court of Appeals finding, not only that a residential builder providing services regulated by the MOC is subject to the MCPA, but also that any breach of a construction contract by a residential builder constitutes, as a matter of law, a violation of the MCPA, was clearly erroneous. It also erred in concluding that a statute that intended to limit a builder's right to institute an action for compensation under a contract performed without a license also precluded the builder from *defending* against a breach of contract action for which it was named as a defendant.

RELIEF REQUESTED

Plaintiff-appellant requests that this Court vacate the September 19, 2006, unpublished Court of Appeals per curiam opinion (Docket No. 260039) and reinstate the December 8, 2004, judgment entered by the trial court.

Respectfully submitted,



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