

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CEC CONTROLS COMPANY, INC.
a Michigan corporation,

Plaintiff,

vs.

Case No. 2012-3338-CK

GRAPAR, INC., a Michigan corporation,
HAROLD W. PARSLOW, TIMOTHY
PARSLOW, and HAROLD W. PARSLOW, JR.,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Defendants have filed a response and request that the motion be denied. Plaintiff has also filed a reply brief in support of its position.

Factual and Procedural History

The instant matter arises out of projects for the engineering, manufacturing, and delivery of large conveyors/washers. Defendant Grapar, Inc. (“Grapar”) and Plaintiff had an ongoing business relationship pursuant to which Plaintiff would provide parts and services in connection with projects for third parties. The business relationship was conducted on open account. When Grapar received payment(s) from customers it would often use the payment to pay off bills other than its debt to Plaintiff.

On July 26, 2012, Plaintiff filed its complaint in this matter. Plaintiff’s complaint contains claims for: Count I- Breach of Contract (against Grapar); Count II- Violation of the Michigan Builders Trust Fund Act (against all Defendants); Count III- Conversion and Statutory

Conversion (against all Defendants); Count IV- Quantum Meruit (against Grapar); Count V- Innocent Misrepresentation (against Grapar); and Count VI- Account Stated (against Grapar). On November 19, 2012, Plaintiff obtained a consent judgment against Grapar in the amount of \$184,371.20 for services and materials provided by Plaintiff in connection with various projects.

On August 19, 2013, Plaintiff filed its instant motion for partial summary disposition pursuant to MCR 2.116(C)(10). Specifically, Plaintiff seeks summary disposition in its favor of Count II of its complaint. Defendants have since filed a response requesting that the motion be denied and that they be granted summary disposition in his favor pursuant to MCR 2.116(I)(2). Plaintiff has also filed a reply brief in support of its position.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support for a claim. In reviewing such a motion, the court will consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Smith v Globe Life Insurance Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is (1) no genuine issue in respect to any material fact and (2) the moving party is entitled to judgment as a matter of law. *Smith, supra*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 446.

Arguments and Analysis

The MBTFA imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts. MCL 570.151 *et seq.*¹ To establish a claim under the MBTFA, a plaintiff must show: (1) that the defendant is a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and materialmen, and (5) that the laborers, subcontractors and materialmen were engaged by the defendant to perform labor or furnish material for the specific construction project. *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 426; 670 NW2d 729 (2003), vacated in part on other grds 471 Mich 925, 689 NW2d 227 (2004). The first element is the only portion at issue in this matter.

When interpreting a statute, the primary goal is to ascertain and give effect to the intent of the legislature. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). The first criterion in determining intent is the specific language of the statute. *Ryant v*

¹ The MBTFA provides in its entirety:

Sec. 1. 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.

Sec. 2. Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefore, 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.

Sec. 3. 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,

Cleveland Twp, 239 Mich App 430, 433; 608 NW2d 101 (2000). The fair and natural import of the terms employed, in view of the subject matter of the law, should govern. *Id.* If the specific language of the statute is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999). The Court must give effect to all words in a statute and may not interpret a statute so as to render some of the terms nugatory. *Talcott v City of Midland*, 150 Mich App 143, 148; 387 NW2d 845 (1985). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *Ryant*, at 433. If the statute provides its own glossary, the terms must be applied as expressly defined. *Id.*, at 434. Otherwise, the Court may consult dictionary definitions. *Id.*

The MBTFA does not define “building construction industry.” There are very few cases that discuss the phrase. See *In re Yacos*, 370 BR 131, 134 -136 (Bkrtcy, ED Mich, 2007). Accordingly, the Court will utilize the plain language of the statute to determine its intent, along with relevant case law. In *Allied Mechanical Services, Inc v DR & W Engineering & Design, Inc*, unpublished per curiam opinion of the Court of Appeals, decided March 22, 2007 (Docket No. 266165) the Court stated:

The BTFA does not define “building,” “construction,” or “improvement.” Defendants argue that these terms should be given their plain and ordinary meanings, under which the leak testing performed by AMS would not constitute “building” or “construction,” rendering the BTFA inapplicable.

However, statutes which relate to the same subject or share a common purpose are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things. We agree with plaintiff that the Construction Lien Act (CLA), MCL

subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud. MCL 570.151 to 570.153.

570.1101 *et seq.*, is in pari materia with the BTFA. The purpose of the CLA is to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs. Both pertain to the construction industry and are intended to protect the interests of those involved in the industry. We will therefore apply the definition of “improvement” found in the CLA.

The CLA defines “improvement” as:

the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract. (Citations omitted).

Although not binding precedent, the Court is persuaded by the reasoning set forth in *Allied Mechanical*. Therefore, part of the question involved is whether the underlying contract involved the installation of a fixture. However, as set forth in *HA Smith Lumber*, it must first be established that Defendant is in the “building construction industry,” and that Defendant was paid a “building contract fund.” In this case, the Court is satisfied that Defendant is not within the building construction industry.

In this case, Plaintiff and Grapar worked together to engineer and manufacture washers and conveyors at third parties’ commercial properties. Specifically, Plaintiff engineered and manufactured and installed the control panel for some of Grapar’s machines. (*See Dep.*, of Patrick Parslow, at 90.) Grapar’s largest product, the seed box washer, is 15ft tall, 10 ft wide and 40 ft long. (*Id.* at 86.) Patrick Parslow also testified that installing the machine involved running the wiring of the machine into the wiring of the building, as well as performing plumbing work to connect the machine to the building’s plumbing. (*Id.* at 87.) This includes modifying the building’s existing plumbing and electrical. (*Id.* at 87-88.)

The Grapar employee responsible for installation of the products was Defendant Harold Parslow, Jr. (Id. at 107.) He testified that the customers were responsible for connecting the buildings power and plumbing to the machines. (See Dep. of Harold Parslow Jr., at 17.) He also testified that Grapar's involvement with the installation was to provide instructions to the customer and send a "start-up" man to make sure everything is hooked up correctly. (Id.) Further, Mr. Parslow Jr. stated that Plaintiff's responsibilities with respect to installation were limited to making sure that the customer had properly set up the electrical wires to the machine and to confirm that the machine was working properly. (Id. at 20-21.)

It is uncontested that the underlying contracts between Grapar and the third parties involved the designing, fabricating and delivery of various conveyors and washers. However, the contracts themselves did not require Grapar or Plaintiff to install the machines; only to make sure that the machines were working properly once installed by the customers. The facts presented in this case are similar to those presented in *In re Skilled Trades Co, Inc v South Bend Supply Co*, 1 BR 396 (1976). In that case, the Court held that delivery of air conditioners ordered by a third party did not constitute an activity within the building construction industry.

As in *In re Skilled Trade Co*, and unlike the cases relied upon by Plaintiff, the work performed by Grapar and Plaintiff in connection with the underlying contracts was limited to manufacturing and delivering the products ordered by the customers. While it is possible that the machines, once installed, would constitute improvements to the subject properties, the fact remains that Grapar and Plaintiff were only responsible for providing machines to Grapar's customers that would allow them to improve their properties. It is clear from the pleadings and evidence presented that Defendants are not involved in the "building construction industry" or "building construction business" as required by the MBTFA; instead they are in the machine

construction industry. Accordingly, Plaintiff has failed to establish the first requirement for a claim under the MBTFA. Consequently, Plaintiff's motion for summary disposition of its MBTFA claims must be denied and Defendants request for summary disposition in their favor pursuant to MCR 2.116(I)(2) must be granted.

Conclusion

For the reasons set forth above, Plaintiff's motion for partial summary disposition pursuant to MCR 2.116(C)(10) is DENIED. Further, Defendants' request for summary disposition of Count II of Plaintiff's complaint pursuant to MCR 2.116(I)(2) is GRANTED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ Judge John C. Foster 28189

Dated: November 19, 2013

JCF/sr

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