

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

JOSEPH A. BUILDING, LLC,

Plaintiff,

vs.

Case No. 2015-3626-CB

ADVANCED MOLD SERVICES, LLC, DAVE  
FORNER, RICHARD F. COUTURE, GAIL M.  
COUTURE, and FLAGSTAR BANK, FSB,

Defendants.

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OPINION AND ORDER

Defendants Richard F. Couture, Gail M. Couture and Flagstar Bank, FSB have filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has filed a response and requests that the motion be denied. In addition, Movants have filed a joint reply brief in support of their motion.

Additionally, Defendants Advanced Mold Services, LLC ("Defendant Advanced") and Defendant Dave Forner ("Defendant Forner") have filed a joint motion for summary disposition pursuant to MCR 2.116(C)(5) and (8). Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Defendants Richard F. Couture and Gail M. Couture (collectively, the "Coutures") are the owners of real property located at 41332 Windmill St., Harrison Twp., MI ("Subject Property"). Defendant Flagstar Bank, FSB ("Flagstar") is the mortgagee of a mortgage the Coutures granted on the Subject Property.

The instant lawsuit arises out of construction services Plaintiff provided to the Subject Property between September 2014 and March 2015. In September 2014, Defendant Advanced submitted a base bid proposal to perform certain work on the Subject Property. (See Exhibit 4 to Plaintiff's Response) Defendant Advanced is owned and operated by Defendant Forner. On September 23, 2014, Defendant Advanced allegedly entered into a subcontract agreement with Duane R. Lindensmith ("Subcontract").

On September 26, 2014, Mr. Lindensmith and his son-in-law, Joseph DeMonaco formed Plaintiff. JAB applied for a residential builder's license ("RBL") on or about January 26, 2014, but an RBL was not obtained until February 17, 2015. The Subcontract was allegedly assumed by JAB from Mr. Lindensmith. JAB completed the work at issue, and the work was approved by Harrison Township on March 13, 2015.

On October 13, 2015, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff asserts a claim for breach of contract against Defendant Advanced (Count I), a claim for account stated against Defendant Advanced (Count II), a claim for tortious interference with a contract/business relationship against Defendant Advanced and Defendant Forner (Count III), a claim for violation of the building contract fund act, MCL 570.151-153 against Defendant Advanced and Defendant Forner (Count IV), a claim for conversion against Defendant Advanced and Defendant Forner (Count V), and a claim to foreclose on a lien on the Subject Property against the Coutures and Flagstar (Count VI).

On November 13, 2015, Defendant Advanced and Defendant Forner filed their joint motion for summary disposition pursuant to MCR 2.116(C)(5) and (8). On

December 14, 2015, the Coutures and Flagstar filed their joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has since filed a response to both motions. The Coutures and Flagstar have also filed a reply brief in support of their motion. On January 4, 2015, the Court held a hearing in connection with the motions and took the matters under advisement.

## II. Standard of Review

MCR 2.116(C)(5) provides that summary disposition is appropriate if the party asserting the claim lacks the legal capacity to sue. In reviewing such a motion, a court must consider the affidavits, together with the pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5); *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 413; 478 NW2d 693 (1991).

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might

be supported by evidence produced at trial. *Id.*, at 121.

### III. Arguments and Analysis

In their motions, Defendants assert that Plaintiff's claims must be dismissed as it was not licensed at all times it was performing work at the Subject Property.

The Michigan Occupational Code, MCL 339.101 *et seq*, prohibits a person from engaging in certain occupations unless "the person possesses a license or registration issued by the department for the occupation." MCL 339.601(1). Included within the listed occupations is a "Residential Builder." A residential builder is a person engaged in the construction of a residential structure who, for compensation, undertakes with another for "the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of..." the structure. MCL 339.2401(a). In this case, it is undisputed that Plaintiff is a residential builder within the meaning of the statute. Accordingly, MCL 339.2412 restricts a residential builder in certain situations. Specifically, MCL 339.2412 provides, in part:

(1) A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

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(3) A person or qualifying officer for a corporation or a member of a residential builder or residential maintenance and alteration contractor shall not impose or take any legal action to impose a lien on real property unless that person was licensed under this article during the performance of the act or contract.

While Plaintiff concedes that it did not possess an RBL at the time it entered into the Subcontract, or at the time that it commenced work on the Subject Property, it asserts that it may nevertheless seek compensation for the work it performed as since it became licensed while it was performing its duties. In support of its position, Plaintiff relies on *Edgewood v Development, Inc. v Landskroener*, 262 Mich App 162; 684 NW2d 387 (2004).

In *Edgewood*, the plaintiff sought to recover compensation for work it performed in building a home for defendant. The parties' contract was executed on March 16, 2001, after plaintiff applied for an RBL, but before plaintiff received its RBL. The plaintiff ultimately received its RBL on May 23, 2001. On July 23, 2001, 2 months after the RBL was obtained, plaintiff commenced work on the project. The plaintiff maintained its RBL at all times during which it performed work in connection with the project. On appeal, the Michigan Court of Appeals held that MCL 339.2412(1) does not require a residential builder to be licensed at the time the contract is signed in order to bring or maintain an action in a court for the collection of compensation for the performance of the contract. *Id.* at 167. Further, the Court held that:

Before 1980, pursuant to 1965 PA 383, MCL 338.15164 required a residential builder to allege and prove that he was duly licensed at all times during the performance of the act or contract. Therefore, at one time, the trial court's construction of the statute would have been accurate because the unambiguous language of the statute would have required such a construction. However, pursuant to 1980 PA 299, the language requiring a residential builder to allege and prove that he was licensed at all times was deleted and no longer appeared in the statute. By deleting the language "at all times," the Legislature evinced its intent to allow a residential builder who becomes licensed during the performance of the act or contract to bring an action in a court of this state for the collection of compensation for the performance of the act or contract. Because [plaintiff] held a builder's license during the performance of the contract,

MCL 339.2412(1) does not preclude this action. The trial court erred in its determination that § 2412(1) barred plaintiffs' claims.

*Id.* at 168.

As in *Edgewood*, Plaintiff in this case obtained its RBL after it signed the contract at issue, but before it had completed performance. While this Court recognizes that Plaintiff obtained its license near the end of performance, while the plaintiff in *Edgewood* obtained its license shortly after the contract was signed, the difference is immaterial under the holding of the Court in *Edgewood* that: "By deleting the language "at all times," the Legislature evinced its intent to allow a residential builder who becomes licensed during the performance of the act or contract to bring an action in a court of this state for the collection of compensation for the performance of the act or contract." *Id.* at 168. Consequently, the Court is convinced that because Plaintiff obtained its RBL prior to completing performance, section 2412(1) does not operate to bar Plaintiff's claims.

In their pleadings, Defendants cite to *Bernard F. Hoste v Kortz*, 117 Mich App 448; 324 NW2d 46 (1982), *Annex Construction, Inc. v Landskroener*, 191 Mich App 219; 477 NW2d 103 (1991), and *Stokes v Millen Roofing Co.*, 466 Mich 660; 649 NW2d 371 (2002). However, those cases address the application of the substantial compliance doctrine and equity to situations in which the plaintiff is found to have not complied with the statute. In this case, the Court is satisfied that Plaintiff, by obtaining its RBL before completing performance, satisfied the statute under the interpretation set forth in *Edgewood*, thereby negating any need to seek relief under the substantial compliance doctrine or equity. As a result, the cases Defendants have relied upon are not on point.

#### IV. Conclusion

For the reasons discussed above, Defendants Richard F. Couture, Gail M. Couture and Flagstar Bank, FSB's joint motion for summary disposition is DENIED. In addition, Defendants Advanced Mold Services, LLC ("Defendant Advanced") and Defendant Dave Forner's motion for summary disposition is DENIED. 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.

Date: JAN 25 2016

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge